Georgia State University Law Review

Volume 36
Issue 3 *Spring 2020*

Article 4

6-1-2020

The Vacancies Act and an Acting Attorney General

Stephen Migala
sjm112@georgetown.edu

THE VACANCIES ACT AND AN ACTING ATTORNEY GENERAL[†]

Stephen Migala[*]

ABSTRACT

The President's November 2018 designation of Matthew Whitaker to be the Acting Attorney General was unprecedented and calls into question several legal issues. Though many are based on questions of constitutionality, there is a strong and novel argument that the statute used by the President to designate Mr. Whitaker, the Federal Vacancies Reform Act (FVRA), may not be used in such a way. Instead, a separate office-specific statute, 28 U.S.C. § 508, alone controls who may become the Acting Attorney General. By presenting never-before-seen legislative histories to support that conclusion, and by separately applying well-settled canons of statutory construction, it also becomes clear that FVRA cannot be used to designate persons to act in other offices that have their own specific succession statute.

INTRODUCTION

The day after the 2018 national congressional election, the President took an unprecedented action. By appointing Matthew Whitaker as Acting Attorney General, the President, for the first time in the history of the Department of Justice, designated someone to act as Attorney General who was not an officer of the United States.[1] That Mr. Whitaker served for roughly 100 days, and that the President placed him in office after effectively removing the former Attorney General,

---

[†] Editor's Note: At the request of the author, a limited number of citations in this Article deviate from THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 20th ed. 2015) in an attempt to make the Article more accessible to its readers.

[*] Stephen Migala is an attorney based in the District of Columbia and earned a J.D. and an LL.M. in National Security Law from Georgetown Law. He expresses his personal opinions not made on behalf of any entity.

1. This statement does not account for recess appointments, only designations to act as Attorney General.

makes the situation all the more unprecedented and legally suspect on several distinct grounds rooted in statute and the Constitution.

But rather than address grave constitutional questions that courts tend to consider last or altogether avoid, this Article aims to focus on a principal and dispositive argument that has generally been overlooked: the statutory law used to designate Mr. Whitaker as Acting Attorney General—the Federal Vacancies Reform Act of 1998 (FVRA)[2]—may not be used to designate someone to act as Attorney General. Instead, the authority to act as Attorney General is derived from one statute alone: 28 U.S.C. § 508. That authority automatically vests the power to act in the Deputy Attorney General and several other Senate-confirmed Department of Justice (DOJ) officials in a specified sequence.[3] It is not subject to presidential discretion, it is not subverted or displaced by FVRA, and most significantly, the President may not choose between FVRA and § 508 to determine who can become Acting Attorney General.

This Article will show that since 1873, all prior versions of FVRA, known as the "Vacancies Act," gave presidents broad discretion to appoint Senate-confirmed officers—but they consistently and expressly excluded only one office from that broad authority: that of Attorney General. The most recent version of the Vacancies Act, FVRA, was enacted in 1998 and aimed to continue that long-standing axiom. While FVRA omitted the stand-alone clause that explicitly exempted the office of Attorney General from the reach of any Vacancies Act, FVRA functionally retained that clause within a broader and subsuming categorical exemption. In other words, by categorically exempting automatic succession statutes like § 508, FVRA not only continued the 125-year exemption for the office of Attorney General, but also exempted many other high-level offices where Congress already designated a distinct order of succession.

In arriving at this conclusion, this Article takes a position directly contrary to that of DOJ's Office of Legal Counsel (OLC), whose November 2018 opinion expressly sanctioned the appointment of Mr.

2. 5 U.S.C. §§ 3345–3349d (2018).
3. 28 U.S.C. § 508 (2018).

Whitaker.[4] But, as this Article will show, OLC's opinion and reasoning contained many flaws and incorrect assumptions. To elucidate OLC's errors, this Article analyzes the plain text of FVRA, its statutory evolution, the perceived ill the law attempted to remedy, key floor statements by its principal authors, contemporary understandings, historical practices, canons of statutory construction, and other context to dispel each of OLC's main points in turn.

But beyond simply discrediting OLC's arguments, this Article also argues in the affirmative by providing clear support for its own position with legislative histories not recounted anywhere else. Using contemporaneous congressional memoranda and transcripts recently made available from the National Archives, alongside documents from the archives of three of the key sponsoring Senators, this Article's conclusion becomes even more evident: FVRA cannot override the automatic, specific, and required authority in 28 U.S.C. § 508 for certain designated officers to act as Attorney General.

The consequence of this conclusion is significant and is not made lightly. It means that the law the President relied on to appoint Mr. Whitaker, and on which Mr. Whitaker's authority relied, cannot be used. It also means that under the same FVRA statute, any official functions or duties assigned by Congress solely to the Attorney General and taken by Mr. Whitaker while acting in that office were void *ab initio* and may not later be ratified.

While this Article focuses on FVRA and § 508, the analysis performed here is equally applicable to any office for which Congress has specifically designated an order of succession. In the case of such office-specific succession statutes, including § 508, it will be shown that the President has no authority or discretion to subvert them using FVRA or any other general statute.

4. Designating an Acting Attorney Gen., 42 Op. O.L.C., slip op. at 1 (Nov. 14, 2018), https://www.justice.gov/olc/file/1112251/download [https://perma.cc/BKP5-ASGY].

ROADMAP

To conduct a thoughtful analysis, the key statutes, as they currently stand, must first be understood. To aid in this preliminary step, sections I.A and I.B introduce relevant parts of the two main statutes at issue: (1) 28 U.S.C. § 508, which sets forth an automatic order of succession for the office of Attorney General; and (2) 5 U.S.C. §§ 3345–3349d, FVRA, which broadly allows the President to fill various vacancies subject to certain limitations.

Those familiar with the two statutes may wish to begin at Part II, where helpful histories regarding both laws are presented. There, sections A and B explain the history of § 508 and the Vacancies Act to show the continuity of the long-standing axiom that § 508 cannot be displaced or avoided in favor of a vacancies act. Afterwards, section C summarizes the context for what led Congress to pass the newest version of the Vacancies Act, FVRA.

Section III.A then amplifies that context with analysis and archival attestations. By presenting never-before-published legislative histories of FVRA, enormous light is shone on what Congress intended to accomplish and what it thought its words would mean. Tied together with the statutory and contextual histories presented in preceding parts, OLC's principal arguments supporting Mr. Whitaker's appointment, succinctly introduced there, begin to deflate. Next, section III.B briefly analyzes the two statutes according to basic principles of statutory construction before offering the most harmonious way to read the two statutes, give effect to each, and honor both the text and intent of Congress. Section III.C then analyzes the related issue of enforcement against those who do not legally act in another office. Finally, this Article's conclusions are summarized in Part IV.

For those who wish to view the full context of the never-before-published documents on which parts of this Article rely and which were gathered from across four separate archives,[5] this link,

5. The four being the National Archives in Washington, D.C.; Senator Byrd's papers at his Center in Shepherdstown, West Virginia; Senator Thompson's papers at the Modern Political Archives in Knoxville, Tennessee; and Senator Glenn's Archives in Columbus, Ohio.

https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?filename=0&article=3018&context=gsulr&type=additional, provides a full appendix consisting of the whole part of every document excerpted herein and a few others which, for sake of space, were not. When referenced in this Article, each excerpt will append a bracketed citation, pointing to the page in the appendix where the whole document may be viewed, for example, "[App. at __]."[6]

I. The Two Relevant Statutes

An analysis always begins at the text of a statute. To facilitate that, this Article first presents key text and summaries of the statutes at play: 28 U.S.C. § 508 and FVRA.[7]

A. The Specific Succession Statute for the Office of Attorney General (§ 508)

The authority to act in the office of Attorney General in case of vacancy is vested in certain officers by 28 U.S.C. § 508. With a lineage that traces back to DOJ's Organic Act in 1870, this statute has, for nearly 150 years, entrusted leadership of DOJ to only certain senior and Senate-confirmed officers within the same department.[8] The succession is automatic and vests power immediately. No action, paperwork, or other authorization is required. From the moment of vacancy or other qualifying reason, the designee is immediately empowered. The statute is couched in mandatory terms and thus affords no other discretion or displacement from its own required order. So important is the position, that in case one identified officer

6. Each document cited in the appendix has been reviewed by and is on file with the *Georgia State University Law Review*. For ease of accessibility for all readers, these archival documents may be referenced online, at https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?filename=0&article=3018&context=gsulr&type=additional [https://perma.cc/TYC8-9YA2], and are more directly found by pagination referenced as "[App. at __]."

7. FVRA (/fivrə/) is used for ease of reading as an acronym in lieu of the more tedious definite article and initialism: "the FVRA."

8. Act of July 20, 1870, ch. 150, § 2, 16 Stat. 162, 162; Reorganization Plan No. 4 of 1953, 3 C.F.R. 135 (Supp. 1953), *reprinted in* 67 Stat. 636 (1953); Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 612 (codifying the Reorganization Plan No. 4 of 1953 into positive law at 28 U.S.C. § 508); Act of Oct. 19, 1977, Pub. L. No. 95-139, 91 Stat. 1171 (amending 28 U.S.C. § 508(b)).

cannot assume the office, the statute has evolved to include many more designees in a further order of succession.[9] The Attorney General Succession Statute, or "§ 508" for short, reads as follows:

> § 508. Vacancies
>
> (a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 [a specific cross-reference to a single section in the Vacancies Act] the Deputy Attorney General is the first assistant to the Attorney General.
>
> (b) When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.[10]

Immediately, to avoid brewing a misconception, it must be noted that some have been confused by the "may" provision in subsection (a). As will be explained in more detail in section II.A, this term "may" is not the law. And it does not denote a possibility that a confirmed Deputy Attorney General might not become Acting Attorney General in case of vacancy. Rather, it was a stylistic choice by codifiers to use different words when the source law from 1870 was incorporated into Title 28 of the U.S. Code.[11] The source law used the words "shall have

9. 28 U.S.C. § 508 (2018). Today, the number of identified officers is fourteen and includes: one Deputy Attorney General, one Associate Attorney General, one Solicitor General, and eleven Assistant Attorneys General. *E.g.*, 5 U.S.C. § 5315 (2018).

10. 28 U.S.C. § 508.

11. H.R. REP. NO. 89-901, at 182 (1965) (stating that "[t]he words 'may appoint' are substituted for

power" and stated that power was "vested."[12] Moreover, the law's principal author, President Eisenhower, stated that the automatic assumption of a vacant office of the Attorney General was "required."[13] Thus, for this statute, do not be misled by "may."

The more important point to remember is the "shall act" provision in subsection (b) and the overall import of the section. As is evident by its text, this entire section ultimately means to have some Senate-confirmed DOJ officer serve as Acting Attorney General in case of vacancy. The only variable is whether the designated officer is in office, and if said office is empty, who is next in the predesignated and automatic order of succession. Legislative histories and previous versions of the law all firmly support this textual and commonsense reading.

B. The General Succession Statute for Vacancies in Offices: FVRA (§§ 3345–3349d)

Authority to act in Senate-confirmed offices is more broadly controlled by a generic, general succession statute: the Federal Vacancies Reform Act of 1998, or FVRA for short. It was through this statute that the President believed he had the authority to designate then-chief of staff and DOJ-employee Matthew Whitaker to be the Acting Attorney General.[14]

'is authorized to appoint'"); *id.* at 184 (stating that with regard to § 508, "[t]he word 'may' is substituted for 'have the power'"; but not noting the stylistic choice to omit "shall"). While the 1966 law was used to codify Title 5 into positive law, it also transferred provisions that were formerly arranged in Title 5 to other titles, as here. *Id.* Like all changes made in the law, the House Report stressed "no substantive change[s]" were made. *Id.* at 1, 3.

12. *See* discussion *infra* section II.A. "Shall have power" was a common historical way of granting authority. *E.g.*, U.S. CONST. *passim* (thirteen times using "shall have power"); 16 Stat. *passim* (at least fifty-six times using "shall have power"); Act of Mar. 7, 1870, ch. 23, 16 Stat. 75 ("[A]ny officer or clerk . . . shall have power to administer oaths . . . in . . . any such investigation.").

13. *See infra* note 50.

14. That belief was supported by an opinion by DOJ's OLC. Designating an Acting Attorney Gen., 42 Op. O.L.C., slip op. (Nov. 14, 2018), https://www.justice.gov/olc/file/1112251/download [https://perma.cc/BKP5-ASGY].

Vacancies acts have existed in one form or another since 1792.[15] And the version in place today can be traced directly back to 1868,[16] even before the beginnings of § 508. FVRA is codified at 5 U.S.C. §§ 3345–3349d. To show how the statute works generally, FVRA is summarized below. The key section most impacting this Article's inquiry is § 3347, which is presented last.

1. FVRA Offers Three Paths to Act in a Higher Vacant PAS Office

Distilled, FVRA's § 3345 offers three paths to fill a vacancy in what is known as a "PAS" office (those requiring presidential appointment and Senate confirmation):

- (a)(1) The first is the default automatic provision, which requires no action from the President; it states that the "first assistant" *shall* perform the duties of the vacant office (in the case of the office of Attorney General, a separate statute confirms the first assistant to be the Deputy Attorney General (28 U.S.C. § 508));
- (a)(2) The second path may displace the first default path at the discretion of the President, who may instead designate a person currently serving in any office that required Senate confirmation (a PAS officer);
- (a)(3) The third is a more recent option, added in 1998, that allows the President to displace the default provision, so long as the chosen designee is an officer or employee of the same agency, who, during the last year, has served for at least ninety days in a position paid to a level of at least a GS-15.[17] This was the option employed

15. *E.g.*, Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281 (applying only to the Departments of State, Treasury, and War).

16. Act of July 23, 1868, ch. 227, 15 Stat. 168.

17. Though not the topic of this Article, it bears mention that this third category was added at the last minute to ensure the bill would not be vetoed by the President. The first version of (a)(3) would have required a designee to have served for 180 days and excluded noncareer appointees.

by the President to appoint Mr. Whitaker, who met the requirements of this provision.

2. *FVRA Conveys Nearly All Usual Powers to Acting Officers*

A person designated or assuming office through any one of these three paths retains all "functions and duties" of the office as if the acting officer had been confirmed by the Senate. Acting officers only have a few minor differences from Senate-confirmed officers.[18] They include retaining the pay and duties of their first post, not having the honorific of a formal commission, and not being eligible for succession under the 25th Amendment.[19]

3. *FVRA's Time Limits for Acting Officers*

There are time limitations imposed for any person acting under FVRA. They can be summarized as a baseline of 210 days, with an additional 210 days added if a different person is nominated to the Senate but not confirmed, plus yet another 210-day period if that occurs again.[20] That totals 630 possible days outside of the confirmation process prescribed by the Constitution. That time is extended even further for however long either the first or second nomination remains pending before the Senate.[21]

On top of that, when a vacancy occurs within 60 days of inauguration day for a new President, any time period is reset and deemed to begin 90 days after either the vacancy arose or inauguration

18. In theory, statutes could restrict the ability of acting officials to perform certain duties, but such statutes have not been found, and if any do exist, they would be incredibly rare.

19. A separate and significant argument, not detailed here, is that acting officers do not have authority to appoint inferior officers. This is thought to be true because the Constitution offers only two methods to become a regular department head, also considered a principal officer: confirmation by the Senate or appointment during a recess. The discretion that the Constitution affords to Congress to give department heads powers of appointment for certain inferior officers thus necessarily carries that same definition. But acting department heads are inferior officers. And because the Constitution's text does not empower one inferior officer to appoint another, an acting department head cannot appoint an inferior officer. *E.g.*, Designation of Acting Dir. of the Office of Mgmt. & Budget, 27 Op. O.L.C. 121, 122–23 (2003) (arguing that a person temporarily performing the duties of a principal office is an inferior officer).

20. 5 U.S.C. § 3346 (2018).

21. *Id.* § 3346(b).

day, whichever is later.[22] This means that upon a new vacancy, and at the outer limits of FVRA, 150 more days could be added to the usual 630-day limit, totaling 780 days, or 2 years and 50 days—plus the time a nomination sits in the Senate. For all of that time, a single unconfirmed person could act in an office Congress intended to be filled by a Senate-confirmed official.

The troubling time period that FVRA allots will not be analyzed by this Article against the Constitution's Appointment Clause in Article II. Nor will it be analyzed against the Recess Appointments Clause, an appointment through which would last, at its theoretical maximum based on current practice, a few days shy of two years.[23]

As has been noted already, courts typically do not reach constitutional questions if issues can be resolved by statute, and this Article attempts to follow that axiom. Needless to say, the time allotments for acting officials are suspect.

For historical reference, the time limits for acting officials under various iterations of the vacancies acts have evolved in this way: 1792—no limit; 1795—six months; 1863—six months; 1868—10 days; 1891—30 days; 1988—120 days, with two additional 120-day periods after a returned nomination and added time for a pending nomination; and 1998—210 days, with two additional periods, and more time for new administration transitions and nominations pending before the Senate.[24]

4. FVRA's Exemptions

Section 3347 of FVRA is as significant as any other provision of law for the purposes of this Article's analyses. Meant to override

22. *Id.* § 3349a.

23. Of course, today's congressional sessions last nearly the entire year, whereas the need for early vacancies acts was more obvious when, for example, regular sessions of the first ten Congresses to 1809 only averaged 141 days in session each year, and in that same time, recesses between any session, regular or special, averaged 187 days.

24. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281; Act of Feb. 13, 1795, ch. 21, 1 Stat. 415, 415; Act of Feb. 20, 1863, ch. 45, 12 Stat. 656, 656; Act of July 23, 1868, ch. 227, 15 Stat. 168, 168; Act of Feb. 6, 1891, ch. 113, 26 Stat. 733, 733; Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 426 (codification act carrying no changes); Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, § 7(b), 102 Stat. 985, 988 (1988). Note too, that the time periods varied depending on sickness, death, resignation, and other qualified conditions to trigger various vacancies acts.

"housekeeping" provisions in organic acts that give department heads broad power to appoint any person to act in virtually any inferior office, FVRA employs a common legislative tactic called "catch and release" to ensure it is considered first and before other legislation. The word "exclusive" is FVRA's attempt to "catch" all other laws regarding appointment. It then lists two primary ways, in paragraphs (1)(A) and (1)(B), to "release" its primacy and not override other laws governing appointment it did not mean to displace.[25] Section 3347's relevant parts read:

> (a) [Prior FVRA sections] are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office . . . unless–
>
> (1) a statutory provision expressly–
>
> (A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
>
> (B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
>
> (2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate . . . .
>
> (b) Any statutory provision providing general authority to the head of an Executive agency . . . to delegate duties statutorily vested in that agency head to, or to reassign

25. The Senate Report described these laws as "retained," and also listed around forty-some known statutes that would be retained, including 28 U.S.C. § 508. S. REP. NO. 105-250, at 15–16 (1998) (missing numbers twenty-six and twenty-seven in the list of forty-some statutes).

> duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies.[26]

Subsection (b) and the types of statutes it precludes were the primary focus of FVRA. Known as "general housekeeping" or "vesting and delegation" statutes, these were widely used by presidents and department heads to avoid the Senate but still functionally appoint persons to Senate-confirmable positions. Since *every* Executive department,[27] and many other agencies,[28] had vesting and delegation statutes, the bypass of the constitutional Senate-confirmation process became widespread to the point where an estimated 20% of main Executive department PAS positions were made through such "housekeeping" statutes.[29] DOJ was one of the worst offenders, and it often used its housekeeping statutes at 28 U.S.C. §§ 509 and 510[30] to avoid the confirmation process.[31] When several high-profile DOJ

---

26. 5 U.S.C. § 3347 (2018).

27. Every Executive department has vesting and delegation authorities. They are presented here in the order they were enacted but cite to their current codified location. *See* 28 U.S.C. §§ 509–510 (2018) (DOJ); 22 U.S.C. § 2651a(a) (2018) (State Dep't); 31 U.S.C. § 321(b), (c) (2018) (Treasury); 10 U.S.C. § 113(b), (d) (2018) (DoD); Reorganization Plan No. 3 of 1950, 3 C.F.R. 164 (Supp. 1950), *reprinted in* 5 U.S.C. app. at 138 (2018) (Interior); Reorganization Plan No. 2 of 1953, 3 C.F.R. 133 (Supp. 1953), *reprinted in* 5 U.S.C. app. at 159–61 (2018) (Agriculture); 7 U.S.C. § 6912 (2018) (also Agriculture); Reorganization Plan No. 5 of 1950, 3 C.F.R. 165 (Supp. 1950), *reprinted in* 5 U.S.C. app. at 138–39 (2018) (Commerce); Reorganization Plan No. 6 of 1950, 3 C.F.R. 165 (Supp. 1950), *reprinted in* 5 U.S.C. app. at 139 (2018) (Labor); Reorganization Plan No. 1 of 1953, 3 C.F.R. 131–32 (Supp. 1953), *reprinted in* 5 U.S.C. app. at 157–59 (2018) (HHS); 42 U.S.C. §§ 3534, 3535(d) (2018) (HUD); 49 U.S.C. § 322 (2018) (DOT); 42 U.S.C. §§ 7151, 7152, 7252 (2018) (Energy); 20 U.S.C. §§ 3441, 3473, 3742 (2018) (Education); 38 U.S.C. §§ 303, 512 (2018) (Veterans Affairs); 6 U.S.C. § 112(a)(3), (b) (2018) (DHS).

28. For example, the Office of Thrift Supervision. 12 U.S.C. §§ 1462a(e)(1), 1462a(h)(1), 1464 (1998).

29. MORTON ROSENBERG, CONG. RESEARCH SERV., 98-892, THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE'S CONFIRMATION PREROGATIVE 1 (1998), https://www.everycrsreport.com/files/19981102_98-892_e35b004e5166781e938da36cf87598c023b03614.pdf [https://perma.cc/LK7L-M94M].

30. Section 509 "vests" all powers of DOJ in the Attorney General and § 510 allows the department head to make provisions to "delegate" any of his function. 28 U.S.C. § 509 ("All functions of other officers . . . and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions [of Administrative Law Judges and a wholly owned government corporation, FPI (neither group has PAS officers)]"); *id.* § 510 ("The Attorney General may . . . authoriz[e] the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.").

31. ROSENBERG, *supra* note 29, at 2.

positions were filled in that manner, it drew the ire of the Senate and specifically prompted the congressional action that resulted in FVRA.[32]

As will be shown, legislative history is abundantly clear that FVRA's primary aim was to target these "housekeeping" statutes, especially §§ 509 and 510. But in clear contrast, § 508 and other automatic succession statutes described in § 3347(a)(1)(B) were to remain controlling and unaffected.[33]

II. Statutory Histories

With the current text of FVRA and § 508 introduced and explained, it is next prudent to understand how these laws came to be and how they have changed. Those histories obviously would have impacted Congress's decision to either keep, omit, or change certain provisions in those statutes over time.

A. History of § 508: An Automatic Acting AG Based on a Specific Statute

As far back as 1870, when the Department of Justice was first created, it was evident that Congress always intended for only certain specified and Senate-confirmed DOJ officials to lead the department in case of vacancy.[34] At the birth of DOJ, the office of Solicitor General was created as second-in-command and was concurrently given the power to act as Attorney General.[35] Later, amid Congress's expansion of the department and its addition of new senior offices, that

32. *Id.* at 3–4.

33. *E.g.*, 144 CONG. REC. S12,824 (daily ed. Oct. 21, 1998), https://www.congress.gov/crec/1998/10/21/CREC-1998-10-21-pt1-PgS12810-6.pdf [https://perma.cc/QHZ6-TQXE] (statement of Sen. Robert Byrd) ("Moreover, in an effort to squarely address past problems, the Act specifically prohibits the use of general, 'housekeeping' statutes as a basis for circumventing the Vacancies Act. Provisions such as, but not limited to, 28 U.S.C. §§ 509 and 510, which vest all functions of the Department of Justice in the Attorney General and allow the Attorney General to delegate responsibility for carrying out those functions, shall not be construed as providing an alternative means of filling vacancies."); S. REP. NO. 105-250, at 10 (1998) (describing the need for and legislative history of what became FVRA).

34. Act of June 22, 1870, ch. 150, § 2, 16 Stat. 162, 162.

35. *Id.*

power to act was transferred to other Senate-confirmed officials in a specified order of succession.

As a result of several additions and amendments, the automatic-acting-authority provision from DOJ's Organic Act was reworded several times, sometimes awkwardly by codifiers, to insert newly created senior positions. But despite the changes in that succession order, § 508's central purpose to automatically vest authority in a designated officer never waivered through all that time. Only the designated recipient of that authority changed. Once traced, an objective reader will see that the authority still remains as steadfast as it was in 1870. Today, § 508 vests automatic succession powers first in the Deputy Attorney General, next in the Associate Attorney General, and then to either the Solicitor General or several Assistant Attorneys General, in an order determined by the Attorney General.

1. 1870–1953: Succession in DOJ's Organic Act

The first succession provision to the office of Attorney General was enacted within the 1870 Organic Act that established DOJ.[36] Beyond creating the department, the act also created the new office of Solicitor General. The act directed that the Solicitor General shall be an "officer learned in law," and it immediately gave automatic authority to the Solicitor General to act as Attorney General in case of vacancy:

> [The Solicitor General] in case of a vacancy in the office of Attorney-General, or in his absence or disability, shall have power to exercise all the duties of that office.[37]

That 1870 law remained substantively the same for eighty-three years, until 1953.[38] Later, in the 1950s, Presidents Truman and

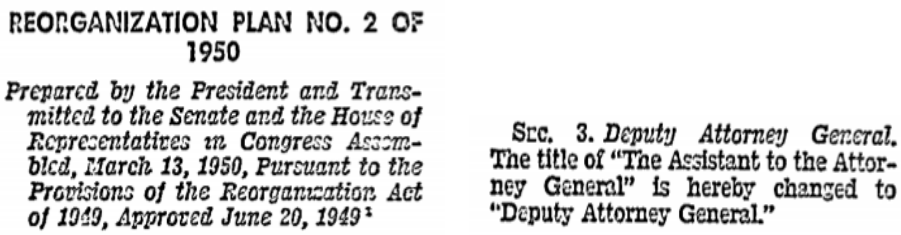
36. *Id.*

37. *Id.*

38. *Compare id.* ("That there shall be in said Department an officer learned in the law, to assist the Attorney-General in the performance of his duties, to be called the solicitor-general, and who, in case of a vacancy in the office of Attorney-General, or in his absence or disability, shall have power to exercise all the duties of that office."), *with* 5 U.S.C. § 293 (1952) ("In case of a vacancy in the office of Attorney General, or of his absence or disability, the Solicitor General shall have power to exercise all the duties of that office.").

Eisenhower, using specific authority granted to the presidency by Congress,[39] reorganized and made significant changes to several agencies and departments, including DOJ. As presented visually in figures below, DOJ was relevantly affected by two Reorganization Plans: No. 2 of 1950 and No. 4 of 1953.[40] Those Reorganization Plans carried the full weight of law and were incorporated into both the Statutes at Large and the U.S. Code.[41]

Reorganization Plan No. 2 of 1950 took the 1903-created and Senate-confirmable office of "Assistant to the Attorney General"—one which was "authorized" and was not required to be filled[42]—and changed its name to "Deputy Attorney General."[43]



REORGANIZATION PLAN NO. 2 OF 1950

Prepared by the President and Transmitted to the Senate and the House of Representatives in Congress Assembled, March 13, 1950, Pursuant to the Provisions of the Reorganization Act of 1949, Approved June 20, 1949[1]

SEC. 3. *Deputy Attorney General.* The title of "The Assistant to the Attorney General" is hereby changed to "Deputy Attorney General."

Figure 1: The relevant excerpts of Reorganization Plan No. 2 of 1950.

Typically, at that time, the second-ranking official in other departments was an assistant secretary or an undersecretary. But in

39. Reorganization Act of 1949, Pub. L. No. 81-109, § 2, 63 Stat. 203, 203.

40. Reorganization Plan No. 2 of 1953, 3 C.F.R. 133 (Supp. 1953), *reprinted in* 5 U.S.C. app. at 159–61 (2018); Reorganization Plan No. 4 of 1953, 3 C.F.R. 135 (Supp. 1953), *reprinted in* 67 Stat. 636, 636 (1953).

41. *E.g.*, 5 U.S.C. § 291 (1958) (stating the codified laws then in force but supplementing as notes the provisions of the Reorganization Plan). The Reorganization Act of 1949 gave the President authority to create efficiencies and eliminate redundancies. § 2, 63 Stat. at 203. One of several areas Congress directed any plan to consider was "the authorization of any officer to delegate any of his functions." *Id.* § 3(5). Once a President transmitted a plan to Congress, it could either disapprove the plan or take no action and have it become law.

42. *Compare* Act of Mar. 3, 1903, ch. 1006, § 1, 32 Stat. 1062, 1062 ("[T]he President is *authorized to appoint*, by and with the advice and consent of the Senate, an assistant to the Attorney-General." (emphasis added)), *with* Act of June 22, 1870, ch. 150, § 2, 16 Stat. 162, 162 ("[T]here *shall be* in the said Department an officer learned in the law . . . to be called the solicitor-general." (emphasis added)).

43. Reorganization Plan No. 2 of 1950, 3 C.F.R. § 163 (Supp. 1950), *reprinted in* 64 Stat. 1261, 1261 (1950) ("The title of 'The Assistant to the Attorney General' is hereby changed to 'Deputy Attorney General.'"). Since only the title of the position was substituted, the 1903 qualifier that the President "is authorized to appoint" was later changed by 1966 codifiers to read "the President may appoint . . . a Deputy Attorney General." *E.g.*, 28 U.S.C. § 504 (2018); H.R. REP. NO. 89-901, at 182 (1965).

DOJ, there were differing titles and rank structures. The position renamed to that of Deputy was made to reflect how the position had evolved to function as more of an assistant-secretary or management-type role, vice a more administrative role.[44] Still, the Solicitor General, who over time became increasingly focused on Supreme Court litigation rather than department management, was still the number-two official in DOJ and next in the Organic Act's line of succession. And indeed, for about three years after the 1950 Plan, the Solicitor General had the power to act as Attorney General (and in fact did),[45] but the title and responsibilities of the Deputy Attorney General office carried with them a connotation that the position was the second-in-command.[46] Three years later in 1953, Reorganization Plan No. 4 specifically addressed that oddity.[47]

2. 1953–1966: Succession in Reorganization Plan No. 4 of 1953

Reorganization Plan No. 4 of 1953 had two overt primary effects: (1) it specifically stated that the powers "vested" in the Solicitor General to act as Attorney General were transferred to the Deputy Attorney General; and (2) it created a further order of succession to have other senior, Senate-confirmed DOJ officials automatically act as Attorney General.[48]

---

44. In an accompanying message to Congress, President Truman said that "[t]hese changes [] are designed to reflect more accurately the position and responsibility of these two officials of the Department of Justice." Harry S. Truman, Special Message to the Congress Transmitting Reorganization Plans 1 Through 13 of 1950, *in* TRUMAN LIBRARY, https://bit.ly/31rMp8V [https://perma.cc/D2QN-T6FM] (last visited Dec. 17, 2019).

45. *See* Acting Attorneys Gen., 8 Op. O.L.C. 39, 40 (1984) (listing vacancies in the office of Attorney General and showing who acted *ad interim* between a resignation and the next appointment, including Solicitor General Phillip B. Perlman from April 7 to May 27, 1952).

46. *See Deputy*, BLACK'S LAW DICTIONARY (4th ed. 1951) ("A substitute; a person duly authorized by an officer to exercise some or all of the functions pertaining to the office, in the place and stead of the latter.").

47. Reorganization Plan No. 4 of 1953, 3 C.F.R. 135 (Supp. 1953), *reprinted in* 67 Stat. 636, 636 (1953).

48. *Id.*

REORGANIZATION PLAN NO. 4 OF 1953

18 F. R. 3577, 67 Stat. 636

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, April 20, 1953, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949, as amended [sections 133z to 133z–15 of this title].

DEPARTMENT OF JUSTICE

§ 1. ACTING ATTORNEY GENERAL

(a) The function with respect to exercising the duties of the office of Attorney General vested in the Solicitor General by section 347, Revised Statutes, as amended [section 293 of this title], is hereby transferred to the Deputy Attorney General, and for the purposes of section 177, Revised Statutes [secton 4 of this title], the Deputy Attorney General shall be deemed to be the first assistant of the Department of Justice.

(b) During any period of time when, by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Assistant Attorneys General and the Solicitor General, in such order of succession as the Attorney General may from time to time prescribe, shall act as Attorney General.

Figure 2: The relevant text of Reorganization Plan No. 4.

The first primary effect is simple enough to understand. The power to automatically act in the office of Attorney General, which originated in DOJ's 1870 Organic Act and was vested in the Solicitor General, simply went to the Deputy Attorney General.[49] This made sense because the Deputy already had functional management control over much of DOJ, whereas the Solicitor General was almost uniquely focused on the Supreme Court.[50]

49. *See* Act of June 22, 1870, ch. 150, § 1, 16 Stat. 162, 162 (establishing the Department of Justice); Acting Attorneys Gen., 8 Op. O.L.C. at 40.

50. *See* H.R. DOC. NO. 83-130, at 1 (1953) (an April 20, 1953 message from the President to Congress to accompany transmittal of Reorganization Plan No. 4 of 1953 concerning DOJ) ("Under present law the Solicitor General is *required* to exercise the duties of the Attorney General in case of the absence or disability of the latter, or in case of a vacancy in the office of Attorney General. . . . The Solicitor General is no longer the appropriate officer of the Department of Justice to be first in the line of succession of officers to be Acting Attorney General. . . . The Department of Justice now has a Deputy Attorney General, provision for that title having been made in Reorganization Plan No. 2 of 1950. The duties of this officer include supervision over all major units of the Department of Justice and over United States

The second primary effect of Reorganization Plan No. 4 of 1953 was to designate a subsequent line of Senate-confirmed successors to head DOJ: either the Solicitor General, or one of the assistant attorneys general, in an order designated by the Attorney General. Thus, apart from the Vacancies Act, which at the time expressly prohibited any other person to act as Attorney General, the further order of succession in this Plan made clear that the office of Attorney General was limited to only certain Senate-confirmed senior DOJ officers.

But what is often confused or overlooked is a third effect, which was not so overt. That third effect, which directly followed the transfer in the order of succession, came from the text: "and for the purposes of [the first specific section of the contemporaneous Vacancies Act], the Deputy Attorney General shall be deemed to be the first assistant of the Department of Justice."[51] Logically, it would not make sense to have that text be a redundant restatement of the provision at the start of the same sentence. And indeed, a historical inquiry suggests that was not necessarily the case.

Reorganization Plan No. 4, like all such plans of the Eisenhower era, came primarily from the President's Advisory Committee on Government Organization (PACGO), chaired by Nelson A. Rockefeller.[52] Documents in President Eisenhower's and Mr. Rockefeller's archives both reveal that the language was meant as a "provision for the Deputy Attorney General to serve as a general assistant to the Attorney General" and was separate from the provision to "act as the head of the Department in his absence."[53] The White House believed that making the Deputy Attorney General the principal assistant "for over-all Departmental management and supervision" would "require legislation."[54] Originally, the recommendation was to

attorneys and marshals. . . . He is, both by title and by the nature of his functions, the officer best situated to act as the administrative head of the Department of Justice when the Attorney General is absent or disabled or the office of Attorney General is vacant." (emphasis added)).

51. Reorganization Plan No. 4 of 1953, 3 C.F.R. 135.

52. Memorandum from the President's Advisory Comm. on Governmental Org. to President Eisenhower (Mar. 14, 1953) [App. at C-4–C-6] [hereinafter PACGO Memo].

53. *Id.* Both provisions that comprised Recommendation No. 2 within the PACGO Memo would be inserted into § 1(a) of the Plan and would later be codified in 28 U.S.C. § 508(a). *Id.*

54. *Id.* Perhaps this belief came from a reading of the Deputy Attorney General's statutory authority at the time, wherein no job function or authorization existed. 5 U.S.C. § 294 (1952).

simply abolish the statutory provision that made the Solicitor General act as head of DOJ in case of vacancy. But after review, that approach was abandoned. Instead, two distinct provisions were inserted: one having to do with succession and swapping the Deputy Attorney General for the Solicitor General, and the other designated the Deputy, as PACGO would summarize, "to serve as general assistant to the Attorney General."[55]

Irrespective of that intent, a legal canon of statutory construction results in the same end. As will be explained in section III.A.7, the provision described contained a specific cross-reference—not to the Vacancies Act of the era as a whole—but to only one specific provision: the one describing "first assistants." In such a case, case law is abundantly clear that a specific cross-reference is not only limited to the one section (not the rest of the act), but that it is frozen in time and the referencing statute, here § 508(a), cannot incorporate later amendments.[56] Put more simply, the cross-reference in Plan No. 4, now codified at 28 U.S.C. § 508(a), only applies to the first section of the Vacancies Act as it existed in June 1953.

3. 1966–1977: Codification of the Reorganization Plan into 28 U.S.C. § 508

In 1966, Congress enacted and reorganized Title 5 of the U.S. Code into positive law.[57] As part of the massive effort, the 1870 automatic succession provision—as modified by Reorganization Plan Nos. 2's and 4's designation of a new senior DOJ rank structure—was codified into its current location at 28 U.S.C. § 508.[58] As can be seen by comparing Figure 2 (Reorganization Plan No. 4 of 1953) above, to Figure 3 (the 1966 codification) below, and as the codifiers specifically and repeatedly stated, the codification statute "made no substantive

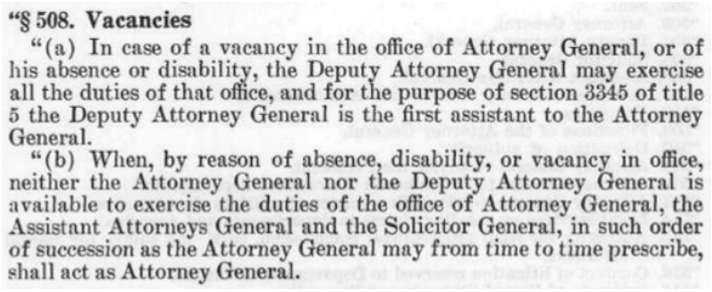
55. *See* PACGO Memo, *supra* note 52 [App. at C-5].

56. Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 769 (2019) ("[A] statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent amendments."); *see also* cases cited *infra* note 259.

57. Government Organization & Employees, Pub. L. No. 89-554, 80 Stat. 378 (1966).

58. *Id.* at 612. *Compare* 5 U.S.C. § 293 (1958) and accompanying notes regarding Reorganization Plans, *with* 80 Stat. at 612 (incorporating those notes with existing Code sections in a new codification).

changes."[59] That is why revision notes accompanying the Code's section describe only what were intended to be minor and stylistic changes.[60]



"§ 508. Vacancies

"(a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.

"(b) When, by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Assistant Attorneys General and the Solicitor General, in such order of succession as the Attorney General may from time to time prescribe, shall act as Attorney General.

Figure 3: The 1966 positive-law codification, which created § 508 within Title 28.

Unfortunately, and as introduced at the outset of this Article, one such stylistic change made by codifiers—use of the word "may"—has given some people pause. A proper substitution of the Reorganization Plans into the 1870 succession provision would have read: "the Deputy Attorney General shall have power to exercise all the duties of that office." But the well-intentioned codifiers, hoping to reduce and simplify wording, ended that same sentence with "the Deputy Attorney General may exercise all the duties of that office . . . ."[61] Of course, case law is clear that in event of just such a disparity, the source law

59. H.R. REP. NO. 89-901, at 182 (1965) ("The purpose of this bill is to restate in comprehensive form, without substantive change, the statutes in effect before July 1, 1965 . . . . In the revised title 5 simple language has been substituted for awkward and obsolete terms . . . ."); *see also* Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision, 139 F.3d 203, 210 (D.C. Cir. 1998) ("No 'substantive changes' were intended [in the 1966 recodification].") (citations omitted); H.R. REP. NO. 89-901, at 3 ("[T]here are no substantive changes made by this bill . . . . In a codification statute . . . the statute is intended to remain substantively unchanged. [also listing court cases that 'affirm this principle']").

60. H.R. REP. NO. 89-901, at 182. The Office of Law Revision codifiers, specifically note at the bottom of today's § 508, that wording was changed, and that "R.S. § 347 is cited as authority inasmuch as the function contained therein [authority to act as head of DOJ] was . . . transferred to the Deputy Attorney General . . . . The word 'may' is substituted for 'have the power.'" 28 U.S.C. § 1821 (1966) (prior law and revision). The explanations appear to have been taken directly from the committee reports accompanying the codification. S. REP. NO. 89-1380, at 203 (1966); H.R. REP. NO. 89-901, at 184.

61. 28 U.S.C. § 508 (1966).

controls.[62] Consequently, "may" is of no moment. The true law states that the Deputy Attorney General shall have power to exercise all the duties of that office in case of vacancy.[63]

Apart from simplification, the codifiers might have been driven to include "may" because they had just codified a section relating to the office of the Deputy Attorney General. As 28 U.S.C. § 504 states: "The President *may* appoint, by and with the advice and consent of the Senate, a Deputy Attorney General."[64] Because that office is elective, to be filled at the discretion of the President, the word "may" in § 508 might also have been used to align with phrasing in § 504 and with the possibility the office itself might be vacant.[65]

Regardless of reason, the true text, "shall have the power," automatically vests the same acting powers upon the Deputy Attorney General just as it did for the Solicitor General. The strongest supporting evidence of this mandatory and automatically vested authority comes from President Eisenhower, the provision's main author. When he transmitted the Plan to Congress, he sent an accompanying message that characterized the designated officer as being "*required* to exercise the duties of the Attorney General in case of the absence or disability of the latter, or in case of a vacancy in the office of Attorney General."[66]

---

62. Source law controls, even over the U.S. Code in the context of a positive-law codification statute. *E.g.*, United States v. Ryder, 110 U.S. 729, 740 (1884) (holding for the Revised Statutes and explaining, "It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed." (citing McDonald v. Hovey, 110 U.S. 619 (1884))); Port Auth. of N.Y. & N.J. v. Dep't of Transp., 479 F.3d 21, 41 (D.C. Cir. 2007) ("[I]t is well established that language revisions in codifications will not be deemed to alter the meaning of the original statute."); Joseph v. U.S. Civil Serv. Comm'n, 554 F.2d 1140, 1155 n.29 (D.C. Cir. 1977) (holding that the source statute at law controlled over the same 1966 positive-law codification). Even the codifiers listed several cases to support their assertion that "[t]he committee wishes to express that in a codification statute . . . the statute is intended to remain substantively unchanged." S. REP. NO. 89-1380, at 18–21.

63. *See* sources cited *supra* note 12 (noting the use of the same common phrasing in the Constitution and in statutes).

64. 28 U.S.C. § 504 (2018).

65. The same is historically true for the Associate Attorney General, which was an office added and elevated in 1977 but which existed since 1973. *See* Act of Oct. 19, 1977, Pub. L. No. 95-139, 91 Stat. 1171, 1171 (adding 28 U.S.C. § 504a); S. REP. NO. 95-429, at 2–3 (1977) (explaining the position of Associate AG was created by Department and Executive Order, but was not always filled; but given supervisory demands and a major role in policy, the position needed to be legislatively created and made subject to confirmation).

66. H.R. DOC. NO. 83-130, at 1 (1953) (emphasis added).

4. 1977–Present: The Same Succession, but Now with a New Associate AG

After Congress made the office of Associate Attorney General official and made its holder the third-ranking officer in DOJ, § 508(b) was amended to insert the office into the order of succession:

> When . . . neither the Acting Attorney General nor the Deputy Attorney is available . . . the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.[67]

While inserting the new office, the 1977 Congress made clear that it meant to "continue" the authority of the Attorney General to designate the remaining order of succession.[68] Thus, while the phrasing "shall act as" was replaced with "to act as" in the last line, the effect was the same. Consequently, through all of its iterations, § 508 as a whole always ensured that a Senate-confirmed DOJ senior officer was authorized to lead the department immediately.[69]

In sum, § 508 can only be read as a statute that immediately vests the power to act as Attorney General in predesignated officers. It is automatic and does not require the designee to affirmatively accept those powers. It is also not subject to any other statute. Moreover, as will be shown, the automatic and specifically designated authorities in § 508 are not displaced by FVRA at the discretion of the President.

---

67. Act of Oct. 19, 1977, Pub. L. No. 95-139, 91 Stat. 1171 (codified at 28 U.S.C. § 508(b) (2018)).

68. S. REP. NO. 95-429, at 3–4 ("Section 2. — Amends section 508(b) of title 28 to specify that the Associate Attorney General is authorized to exercise the duties of the office of Attorney General upon the absence, or disability of the Attorney General or Deputy Attorney General, or in the event of a vacancy in those offices. The section also continues the authority of the Attorney General to designate the further order of succession . . . .").

69. *E.g.*, Memorandum from President Donald Trump to Matthew George Whitaker, Chief of Staff, Dep't of Justice (Nov. 8, 2018) (on file with the Georgia State University Law Review). For any designation other than these automatic authorities, the President historically writes a letter formally designating a person to perform the duties of another office. *Id.* Documentation shows this occurred for Mr. Whitaker. *Id.*

B. History of the Vacancies Act of 1868: Always Superseded by § 508

As previously and briefly introduced, acts for filling vacancies have existed in some form since 1792.[70] The 1792 act applied only to the Secretaries of State, Treasury, War, or any other Senate-confirmed officer in those departments and allowed the President to appoint any person to those offices in case of death, absence, or sickness without any express time limitation.[71] The 1795 act did the same, but limited such authorizations to six months.[72] In 1863, the immediate forerunner to the Vacancies Act expanded that authority to cover any Executive department, but limited the acting person to a head of an Executive department or a presidentially appointed officer therein.[73]

The subsequent version, the Vacancies Act of 1868, was the direct predecessor to FVRA.[74] In short, that 1868 law repealed all other vacancy and succession laws before it and wrote on a clean slate.[75] The Vacancies Act stated that "in case of the death, resignation, absence, or sickness of the head of any Executive department . . . the first or sole assistant thereof shall . . . perform the duties of such head."[76] That automatic acting authority was subject to presidential discretion to authorize and direct any other department head or Senate-confirmed officer in those departments to perform the duties of the vacant office for a period of ten days.[77]

---

70. *E.g.*, Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281.

71. *Id.*

72. Act of Feb. 13, 1795, ch. 21, § 1, 1 Stat. 415, 415.

73. Act of Feb. 20, 1863, ch. 45, § 1, 12 Stat. 656, 656. Thus, other offices outside of Executive departments still carried their own office-specific succession statutes, usually contained within an office's organic act. *E.g.*, Act of Mar. 2, 1799, ch. 43, § 1, 1 Stat. 733, 733 (having an office-specific succession provision for the Post Office, which did not become an Executive department until 1872).

74. *Oversight of the Implementation of the Vacancies Act: Hearing on S. 1764 Before the S. Comm. on Governmental Affairs*, 105th Cong. 1 (1998) [hereinafter *Hearings*] ("The law was adopted in, essentially, its current form in 1868 . . . ."). The hearings on S. 1764 were repeatedly referenced in the Senate Report and influenced a significant part of S. 2176, most of which remained verbatim and became FVRA. *E.g.*, S. REP. NO. 105-250, at 9 (1998) (referring to the hearings on Mar. 18, 1998).

75. Act of July 28, 1868, ch. 227, § 4, 15 Stat. 168, 169 ("[A]ll acts heretofore passed on the subject of temporarily supplying vacancies in the executive departments . . . are hereby, repealed.").

76. *Id.*

77. *Id.*

Only five years later, an odd quirk of history occurred. Until 1873, federal statutes were amassed as compilations. No enacted statute explicitly altered the text of a prior one, even when a partial repeal was explicit. That all changed when Congress authorized the President to commission three persons "to revise, simplify, arrange, and consolidate all statutes of the United States."[78] Even more specifically, those codifiers were given authority to "bring together all statutes and parts of statutes . . . omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions."[79] It took the codifiers several years, but, finally, in 1874, they codified all laws enacted before December 1, 1873.[80]

Unlike what we are used to with modern codifiers who are much more careful and have more limited authority to "remove ambiguities, contradictions, and other imperfections,"[81] the first Revised Statutes codifiers were given unusual and vast authority to rewrite the texts of prior acts.[82] And it just so happened that between 1868, when the Vacancies Act was passed, and 1873, when the first codifiers finished their work, DOJ's Organic Act and its specific succession provision was enacted.

Consequently, it was not Congress but rather the first codifiers who altered the existing Vacancies Act and wrote into it the explicit exemption for the office of Attorney General:

> Sec. 179. In any of the cases mentioned in the two preceding sections, *except the death, resignation, absence, or sickness of the Attorney General,* the President may, in his direction,

78. Act of June 27, 1866, ch. 140, § 1, 14 Stat. 74, 74.

79. *Id.* § 2, 14 Stat. at 75.

80. For background on this process, see Margaret Wood, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, LIBR. OF CONG. (July 2, 2015), https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code/ [https://perma.cc/YPF8-7525] and Will Tress, *Lost Laws: What We Can't Find in the U.S. Code*, 40 GOLDEN GATE U. L. REV. 129 (2010), https://digitalcommons.law.ggu.edu/ggulrev/vol40/iss2/2 [https://perma.cc/TU3L-G7L3].

81. 2 U.S.C. § 285b (2018) (describing the duties and authorities of the House's Office of Law Revision Counsel).

82. Act of June 20, 1874, ch. 333, 18 Stat. 113. For an excellent history of the Revised Statutes, see Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1012–14 (1938) (explaining the codification process) ("The 1873 revision is the only occasion on which Congress has enacted as law a complete revision of all the federal permanent public statutes.").

> authorize and direct the head of any other Department or any other officer in either Department, whose appointment is vested in the President, *by and with the advice and consent of the Senate*, to perform the duties of the vacant office . . . .[83]

Under their reconciliation, first assistants would still automatically take over, but the provision granting the President the discretion to instead appoint a different Senate-confirmed officer was subject to only a singular limitation: a president could not fill a vacant office of Attorney General.

Thus, it was without question by codifiers, in their first careful incorporation and study of statutes, that the later-enacted and more specific 1870 DOJ Organic Act—which contained the version of today's § 508—superseded and served as an exemption to the catch-all provisions of the Vacancies Act of 1868.[84] Congress enshrined that construction as official when it codified the Revised Statutes as positive law,[85] and that text remained for well over a century.

Although other specific succession statutes were enacted after that codification—and they were universally understood to supersede the Vacancies Act[86]—none were written into the text of that Act, because Congress chose never to directly amend that positive law.

---

83. REV. STAT. § 179 (1873) (emphases added). The provision was the same in the 1873 and 1878 Revised Statutes compilations. *Id.*; REV. STAT. § 179 (2d ed. 1878).

84. *See* CONG. GLOBE, 39th Cong., 2d Sess. 1163–64 (1868) (statements by Sen. Lyman Trumbell, the principal sponsor of the Act, indicating the 1868 Vacancies Act was to apply to all vacancies). Recall that not two years later, Congress passed DOJ's Organic Act and vested sole acting authority in the Solicitor General, which would later be given to the Deputy Attorney General. *See also, e.g.*, Act of July 23, 1868, ch. 227, § 2, 15 Stat. 168, 168 (the 1868 Vacancies Act § 2, using phrasing to show exclusivity); *Hearings*, *supra* note 74, at 3 ("[T]he legislative history of 1868 certainly indicated that the Framers seemed to think that the Vacancies Act was the exclusive means by which appointments were made.").

85. Act of June 20, 1874 § 2, 18 Stat. 113 ("[T]he revised statutes of the United States . . . when printed . . . shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States . . . .").

86. Even despite the lack of direct affirmation in the text of law, DOJ, OLC, GAO, and even the Senate recognized that the later-enacted and the more specific office-succession statutes superseded the Vacancies Act. *E.g.*, *Hearings*, *supra* note 74, at 26 (testimony of OLC Special Counsel Daniel Koffsky) ("In 1868, when Congress first passed the Vacancies Act in essentially its present form, it repealed the then-existing statutes on filling vacancies. Since 1868, however, Congress has enacted other statutes that, in our view, apply to vacancies of particular departments or agencies."); *id.* at 28–29 (testimony of GAO Associate General Counsel Joan M. Hollenbach) ("We believe that the application of the Vacancies Act

Nor would future codifiers ever be granted such broad authorities again. After numerous errors were later discovered in the first Revised Statutes,[87] Congress limited the discretion of the codifiers for the second Revised Statutes in 1878, instead instructing them to write notes in margins for any laws that "may in any manner affect or modify any provisions of the Revised Statutes."[88] And unlike the first edition of the Revised Statutes, the second edition was not codified into

---

can be superseded only if there is specific statutory language providing another means for filling the particular vacancy in question. We have a number of opinions where we have found such statutory provisions to exist, and when that type of statutory provision does exist, we have concluded that the Vacancies Act does not apply . . . we would suggest adding an amendment to explicitly provide that the Vacancies Act can be superseded only by another statute that provides an alternative means for filling a specific identified vacancy."); The Honorable William Proxmire United States Senate, 65 Comp. Gen. 626, 634 (1986) (B-220522, 1986 WL 60691) ("Our interpretation of the [Vacancies] Act has consistently recognized that its application can only be superseded in the case of statutes that provide specifically for an alternate means of filling a particular office." (specifically cited by S. REP. NO. 100-317, at 14 (1988) "as consistent with the meaning of the Vacancies Act.")); S. REP. NO. 100-317, at 14 ("The exclusive authority of the Vacancies Act would only be overcome by specific statutory language providing some other means for filling vacancies."); Status of the Acting Dir., Office of Mgmt. & Budget, 1 Op. O.L.C. 287, 287 (1977) (explaining that the Vacancies Act is not applicable to the office of Director of OMB in light of the specific statutory authority providing for the filling of the specific position); *see also, e.g.*, Transcripts from S. Comm. on Governmental Affairs, Business Meeting (June 17, 1998) [App. at A-75] [hereinafter Transcript of June 17th GAC Meeting] ("[I]n our wisdom, Congress has over the years exempted a number of positions, as you indicated earlier, from the Vacancies Act by providing a specific way to designate a replacement."); Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 61–63 (1999) (stating that the list of 40-some statutes in the Senate Report "continue to apply to filling certain vacant PAS positions" and characterizing this as a "continued" practice several other times in its guidance). Even the current Attorney General, William Barr, agreed with this take when he was an Assistant Attorney General at OLC. *See* Application of Vacancy Act Limitations to Presidential Designation of an Acting Special Counsel, 13 Op. O.L.C. 144, 145 (1989)); *see also Restructuring the Law Enforcement Assistance Administration: Hearings Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 95th Cong. 285–97 (1978) [App. at B-5–B-15] (excerpting letter from OLC that said: "In its January 10 letter the Department took the position that the specific vacancy provisions relating to the Department of Justice prevail over the earlier and more general language of the Vacancies Act (5 U.S.C. §§ 3346–3349)."); *id.* ("It is our view that legislation, such as 28 U.S.C. 509 and 510, is to be construed, not as being subordinated to the Vacancies Act, but as remedial legislation designed to supersede it."); *id.* ("Of the eleven Executive departments, . . . five additional ones have acting officer provisions like 28 U.S.C. § 508 in their organic legislation . . . Consequently, the thirty-day provision of 5 U.S.C. 3348 is inapplicable to the acting heads of six out of the eleven Executive departments." (quote from a letter by Mr. Dixon of OLC, to which Mr. Barr referred in his 1989 OLC opinion)). Even DOJ's own regulations as to the succession to the office of Attorney General do not reference any Vacancies Act at all; however, the regulations do expressly mention § 508, DOJ's office-specific statute, and rely on it for the regulation's authority. 28 C.F.R. § 0.137 (2019). The regulation does not read as if the § 508 succession orders are optional or able to be displaced. *Id.*

87. Dwan & Feidler, *supra* note 82, at 1014 (describing that 259 errors were later discovered and how Congress was reluctant to enact a law making such codifications the actual law in the future).

88. Act of Mar. 2, 1877, ch. 82, § 2, 19 Stat. 268, 268. The second Revised Statutes would be the last codification project for many years.

positive law and was only considered prima facie evidence of the law.[89] The same was true for the first edition of the U.S. Code in 1926, whose authorizing law stated the following in a preface: "nothing in this Act shall be construed as repealing or amending any [] law."[90] More simply put, the codifiers that wrote in the explicit exemption for the office of the Attorney General were the only ones in history given such authority. That they happened to be granted, and used, that authority only a few years after the Vacancies Act of 1868 was a chance quirk of history.

Still, the effect of that history was that the explicit exemption for the office of the Attorney General became source law. And even when the provision was subsequently codified into positive law in Title 5 of the U.S. Code in 1966, it remained substantively unchanged[91]: "This section does not apply to a vacancy in the office of Attorney General."[92] The provision would continue unaffected until 1998, when FVRA was enacted.[93]

Before moving on to explore the odd history of FVRA, how the explicit exemption remained in the draft versions of FVRA, and why it was removed, remember this take away: the sole explicit exemption to the Vacancies Act, which kept a president from appointing anyone else to act as Attorney General, lasted for at least 125 years.[94]

89. Wood, *supra* note 80.

90. Act of June 30, 1926, ch. 712, § 2, 44 Stat. 1, 1.

91. The codification of the Title intended no substantive changes in law. H.R. REP. NO. 89-901, at 1 (1965); *see also supra* text accompanying note 59. According to at least one researcher, the reason Congress limited the Vacancies Act to exclude the specific position of Acting Attorney General was to ensure that a president could not choose someone from outside the department who might skew the positions of the Justice Department during their temporary installation. *Hearings*, *supra* note 74, at 41 (statement of CRS specialist Morton Rosenberg).

92. Government Organization and Employees, Pub. L. No. 89-554, § 3347, 80 Stat. 378, 426 (1966).

93. In 1998, Congress amended the Vacancies Act to expand the scope of § 3345 from Executive departments to Executive agencies, and it extended the time limits to 120-day periods, with certain possible extensions. Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, § 7, 102 Stat. 985, 988 (1988).

94. The long-standing practice and understanding gives great deference in any subsequent issue of statutory construction. *See, e.g.*, NLRB v. Noel Canning, 573 U.S. 513, 533 (2014) ("And three-quarters of a century of settled practice is long enough to entitle a practice to 'great weight in a proper interpretation' of the constitutional provision." (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929)).

C. FVRA: Context and Comparison from Draft Bill to Enacted Law

What drove Congress to amend the Vacancies Act and pass FVRA in 1998 had absolutely nothing to do with the position of Attorney General. In fact, not one discussion, question, or point of any kind was ever raised to suggest Congress wanted to make a dramatic change to the well-established practice and explicit text exempting the office of Attorney General. Instead, the focus of the new law was aimed at DOJ, but *only* with respect to its take on acting appointments to lower-level offices through vesting and delegation statutes like 28 U.S.C. §§ 509 and 510, otherwise known as "housekeeping statutes."[95]

As the contemporary 1998 report from the Congressional Research Service (CRS) recounts, the main appointment that spurred FVRA was the Attorney General's designation of Mr. Bill Lann Lee to the position of Acting Assistant Attorney General for Civil Rights.[96] Mr. Lee was nominated by the President to the position in July 1997, but his nomination was returned in November.[97] The next month, in December 1997, using authorities in 28 U.S.C. §§ 509 and 510, the Attorney General functionally appointed Mr. Lee to act in the same position.[98] While Mr. Lee was acting in the position, the President again formally nominated him to the same position.[99] However, the Senate would never confirm him. Mr. Lee ultimately served for nearly

95. Stephen Migala, The Vacancies Act and a Post-Vacancy First Assistant of USCIS 6–13, section II.B (Sept. 9, 2019) [hereinafter Migala, Vacancies Act II] (unpublished manuscript) https://papers.ssrn.com/abstract=3450843 (describing in more detail the use of housekeeping statutes as the main impetus for FVRA). This author has written three articles on different aspects of and controversies over FVRA. This Article is the first. The one just cited in this note is the second; it analyzed whether a first assistant installed after a vacancy already occurred could act in that vacant office. And the third article discusses FVRA's enforcement mechanism in § 3348. *See* Stephen Migala, The Vacancies Act and Its Anti-Ratification Provision (Nov. 14, 2019) [hereinafter Migala, Vacancies Act III] (unpublished manuscript), https://papers.ssrn.com/abstract=3486687.

96. ROSENBERG, *supra* note 29, at 1; *see also* S. REP. NO. 105-250, at 3 (1998) (part on "Need for Legislation"). Even the Government fully acknowledges that Senate circumvention via housekeeping statutes was the impetus for and target of FVRA. *E.g.*, Brief for the Petitioner at *6–10, NLRB v. SW Gen., Inc., 137 S. Ct. 929 (2017) (No. 15-1251), 2016 WL 4363344.

97. Memorandum from Morton Rosenberg, Cong. Research Serv., on Validity of Designation of Bill Lann Lee as Acting Assistant Attorney Gen. for Civil Rights 10–11 (Jan. 14, 1998).

98. *Id.*

99. Migala, Vacancies Act II, *supra* note 95, at 12.

three years in the position, based on unlimited-time authorities in §§ 509 and 510.[100]

That sidestep drew the ire of Congress, and Senators Thompson, Thurmond, and Byrd in particular.[101] But it was not the only such example of evasion.[102] As the CRS report notes, in 1998 alone, the same year that FVRA was enacted, around 20% of main Executive department PAS positions were being filled by temporary designees, many of whom exceeded the Vacancies Act 120-day time limit.[103] Some members of Congress, as well as the Comptroller General, believed that such use of "housekeeping statutes" like §§ 509 and 510 constituted an improper avoidance of both the Vacancies Act and of the Constitution's Appointment Clause.[104] But DOJ took the opposite view and continued to use the broad and non-time-limited authority from its housekeeping statutes.[105]

---

100. ROSENBERG, *supra* note 29, at 3. Eventually, the President used a recess appointment to more officially appoint Mr. Lee in August 2000. *See* Christopher Marquis, *Clinton Sidesteps Senate to Fill Civil Rights Enforcement Job*, N.Y. Times (Aug. 4, 2000), https://www.nytimes.com/2000/08/04/us/clinton-sidesteps-senate-to-fill-civil-rights-enforcement-job.html [https://perma.cc/LTW8-WH68].

101. *Thompson Says Justice Department "In Flagrant Violation of Law,"* U.S. SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENTAL AFF. (Mar. 18, 1998), https://www.hsgac.senate.gov/media/minority-media/thompson-says-justice-department-in-flagrant-violation-of-law [https://perma.cc/2KZM-KV7Q] [hereinafter *Thompson Statement*] ("What we're talking about today is where people who are running the government in positions which should be filled with the advice and consent of the Senate are never approved by the Senate. . . . The current situation cries out for oversight, and it now demands action. Senators Byrd and Thurmond, two of our witnesses today, have introduced legislation recently which would address this long-standing problem.").

102. DOJ often used this sidestep. Apart from Mr. Lee, the Attorney General designated Walter Dellinger to act as Solicitor General and Seth P. Waxman to act as Deputy Attorney General. OFFICE OF ATTORNEY GEN., DESIGNATION ORDER 2038-96, DESIGNATING WALTER DILLINGER AS ACTING SOLICITOR GENERAL (1996) [App. at A-120]; OFFICE OF ATTORNEY GEN., DESIGNATION ORDER, DESIGNATING SETH P. WAXMAN AS ACTING DEPUTY ATTORNEY GENERAL (1997) [App. at A-121]. Mr. Dellinger served for over sixteen months, until Seth Waxman was confirmed and took his oath sometime after November 7, 1997. *PN660—Seth Waxman—Department of Justice*, CONGRESS.GOV, https://www.congress.gov/nomination/105th-congress/660? [https://perma.cc/BPZ7-W799] (last visited Sept. 11, 2019).

103. ROSENBERG, *supra* note 29. "Main" is qualified here because some PAS offices like U.S. Attorneys and Ambassadors were not surveyed; only the highest PAS offices in departments were surveyed, which totaled 320 in all.

104. *Id.*; *see also, e.g.*, 65 Comp. Gen. 626, 631–33 (1986) (citing S. REP. NO. 100-317, at 14 (1988)), https://www.gao.gov/products/422205 [https://perma.cc/PPH9-W75V].

105. *E.g.*, *Hearings*, *supra* note 74, at 25–28 (testimony of Principal Deputy Associate Attorney General Joseph Onek) ("Since 1868, however, Congress has enacted other statutes that, in our view, apply to vacancies of particular departments or agencies. . . . [W]e believe that the Attorney General has ample authority, outside the Vacancies Act, to provide for the temporary discharge of duties of Department officers when their positions become vacant."); Application of Vacancy Act Limitations to Presidential

DOJ's position from at least 1973 to 1998 was the same one taken in this Article and which DOJ has since abruptly abandoned: that a later enacted and more specific statute controlled. This same position followed basic canons of statutory construction and was used by DOJ to argue that its 1950-enacted,[106] department-specific housekeeping statutes superseded the 1868-enacted and broader Vacancies Act.[107]

Separately, DOJ also properly refuted an argument advanced by many in the Senate: that when Congress amended the Vacancies Act in 1988, clear legislative intent as to its exclusivity was evinced in the accompanying Senate report, which stated, "The exclusive authority of the Vacancies Act would only be overcome by specific statutory language providing some other means for filling vacancies."[108] That clear expression of intent was dismissed by OLC as a committee improperly altering the construction of a statute through subsequent legislative history. OLC's argument was in fact supported by case law, and even somewhat persuasive, because the 1988 amendments did not affect then-§ 3349, which dealt with the act's exclusivity.[109]

But much of the Senate still firmly disagreed with DOJ's arguments, agreeing instead with the Comptroller General and believing that the 1988 Senate Report accompanying the Vacancies Act amendments evinced an authoritative indication of how to construe the law.[110]

Designation of an Acting Special Counsel, 13 Op. O.L.C. 144, 145 (1989).

106. Though DOJ's vesting (§ 509) and delegation (§ 510) statutes were enacted through Reorganization Plan No. 2 of 1950, the Attorney General had prior authority to delegate general duties within DOJ, as its Organic Act provided. Act of June 22, 1870, ch. 150, § 14, 16 Stat. 162, 164. This Article takes no position on whether specific duties statutorily assigned to specific offices after 1870 could in fact be delegated under that 1870 authority prior to 1950.

107. *E.g.*, Letter from Robert Dixon, Assistant Attorney Gen., Office of Legal Counsel, to Senator Roman Hruska (Mar. 13, 1973) [App. at B-15] ("The Comptroller General's conclusion that the Vacancies Act must prevail over all subsequent and specific statutes disregards conventional principles of statutory construction."); Letter from Andrew Fois, Assistant Attorney Gen., Office of Legislative Affairs, to Senator Strom Thurmond (July 10, 1997) [App. at A-115]; Memorandum from John Harmon, Assistant Attorney Gen., Office of Legal Counsel, to the Attorney Gen., (Feb. 27, 1978) [App. at B-8] ("If the authority of a person to perform the functions of the bead of an agency can be based on two grounds—the general provision of [the Vacancies Act] and a special one, such as the [agency's specific delegation statute] here involved—the special source of authority prevails.").

108. S. REP. NO. 100-317, at 14.

109. Application of Vacancy Act Limitations to Presidential Designation of an Acting Special Counsel, 13 Op. O.L.C. at 145.

110. *E.g.*, S. Res. 128, 105th Cong. (1997), https://www.congress.gov/105/bills/sres128/BILLS-105sres128is.pdf [https://perma.cc/Z7Q8-SAUU]; 144 CONG. REC. S6416 (daily ed. June 16, 1998),

Unable to dissuade DOJ, and noting that other agencies were also making appointments through their own housekeeping statutes, members of the Senate took steps towards a new law to prevent what in their view was DOJ circumventing the statute and the Constitution's Appointment Clause.[111] Those efforts began with Senate bill 1764,[112] the first draft of what would later become FVRA.

S. 1764, authored by Senator Strom Thurmond, served as a model for the basic structure of FVRA.[113] Notably, confirming that the true target of FVRA was housekeeping statutes, the explicit exemption for the office of Attorney General was in fact included in S. 1764. But what the bill did differently is structure a new draft-§ 3347 to require that the law would be universally applicable to vacancies in all PAS offices, and exempted them only if "another statutory provision expressly provides that such provision supersedes [the Vacancies Act]" or if the "President makes an appointment to fill a vacancy in such office during a recess of the Senate."[114] Thus, S. 1764 was written in a way to catch all other PAS office successions and only make three exceptions: statutes with an express-statement requirement, a constitutional recess appointment, or for the office of Attorney General. Clearly, Senator Thurmond did not want to target § 508 and intended to keep that succession order unaffected.

---

https://www.congress.gov/crec/1998/06/16/CREC-1998-06-16-pt1-PgS6405-3.pdf [https://perma.cc/59QA-D5YF] (statement of Sen. Strom Thurmond explaining the DOJ impetus for cosponsoring the FVRA bill); 143 CONG. REC. S10,068 (daily ed. Sept. 26, 1997), https://www.congress.gov/crec/1997/09/26/CREC-1997-09-26-pt1-PgS10068.pdf [https://perma.cc/ZHF6-ATTS] (introducing S. Res. 128 and providing statements as to why).

111. *Hearings*, *supra* note 74, at 1–5; *see also, e.g.*, 144 CONG. REC. S6416 (daily ed. June 16, 1998), (statement of Sen. Fred Thompson introducing FVRA) ("The bill preserves those [existing office-specific succession] statutes, but, to clearly reject the position of the Justice Department, it expressly repudiates the contention that a law authorizing the head of a department to delegate or reassign duties among other officers is a statute that provides for the temporary filling of a specific office.").

112. S. 1764, 105th Cong. (1998) (as introduced in the Senate on Mar. 16, 1998), https://www.congress.gov/105/bills/s1764/BILLS-105s1764is.pdf [https://perma.cc/E2MH-8YE3].

113. *Compare id.*, *with* S. 2176, 105th Cong. (1998), https://www.congress.gov/105/bills/s2176/BILLS-105s2176is.pdf [https://perma.cc/DNA2-7RWE] (similar structure and phrasings); *see also* Memorandum from Fred Ansell to Senator Fred Thompson (Apr. 24, 1998) [App. at A-8] (handwriting in the margins of the first draft of S. 2176 reading, "This follows the Thurmond bill format.").

114. S. 1764.

During hearings on S. 1764, an associate general counsel of the GAO, who served under the Comptroller General, noted that the bill had a broad catch all and unnecessarily superseded other office-specific statutes.[115] The GAO counsel offered three suggestions to improve the bill, each of which would be incorporated into the next version of the bill.[116] The most relevant one was: "we would suggest adding an amendment to explicitly provide that the Vacancies Act can be superseded only by another statute that provides an alternative means for filling a specific identified vacancy."[117]

After considering recommendations from hearings on S. 1764, and after working with Democratic staff on the Senate Governmental Affairs Committee (GAC), GAC's chairman, Senator Fred Thompson, used much of S. 1764 to write and then introduce Senate bill 2176 in June 1998.[118]

Like S. 1764 before it, S. 2176's clear purpose was to put more officials through the Senate's advice-and-consent process, not less. To enable that goal, the bill proposed several changes to the existing law. Most either directly targeted the housekeeping statutes or fixed systemic reasons used to justify why such Senate-evading appointments were necessary.

For one, to allow more time for the Senate to handle the larger load of PAS positions in an expanding federal government, which today has around 1,242 PAS positions,[119] the bill extended the time designees could act in an office.

The bill also expanded the types of vacancies that would qualify under the act to include any reason why the officeholder "is otherwise unable to perform the functions and duties of the office."[120] This new, broader term was added specifically in response to a D.C. Circuit

115. *Hearings*, *supra* note 74, at 29, 152 (testimony of GAO Associate General Counsel Joan M. Hollenbach).

116. *Id.*

117. *Id.* at 29; *see also id.* at 154 (similarly stating).

118. Memorandum from Fred Ansell to Senator Fred Thompson, *supra* note 113 [App. at A-1, A-8].

119. *See* COMM. ON HOMELAND SEC. & GOV. AFFAIRS, 114TH CONG., POLICY AND SUPPORTING POSITIONS 114–26 (Comm. Print 2016) (known best as the "Plumbook").

120. 5 U.S.C. § 3345(a); S. 2176, 105th Cong. (1998).

ruling that limited the scope of the Vacancies Act of 1868.[121] Accordingly, because that same wording remained in the enacted law, FVRA now applies to more officials and any kind of vacancy, including those created by firing or removal.[122]

Another change directly targeted the provisions that allowed Mr. Lee to act in office for so long. The bill aimed to "create a clear and exclusive process"[123] for filling PAS office vacancies and crafted "catch-all" provisions to ensure that DOJ and others could no longer argue that housekeeping statutes like §§ 509 and 510 could be used in lieu of the act.[124]

S. 2176 passed the Senate Committee on Governmental Affairs on June 17, 1998, and was reported to the Senate on July 15, 1998.[125] It was a well-researched bill and came with a detailed committee report further explaining its provisions.[126] Unfortunately, the bill was not acted upon by the fifty-five-seat Republican Senate majority because it could not gather the three-fifths support needed to overcome a filibuster, receiving only one Democratic vote from Senator Byrd.[127]

Instead, negotiations continued, and after amendments and concessions to the White House and after significant efforts from Senator Byrd,[128] the draft bill passed in a different form as part of the

121. Doolin Sec. Sav. Bank. v. Office of Thrift Supervision, 139 F.3d 203, 208 (D.C. Cir. 1998); S. REP. NO. 105-250, at 12 (1998).

122. *E.g.*, 144 CONG. REC. S12,823 (daily ed. Oct. 21, 1998), https://www.congress.gov/crec/1998/10/21/CREC-1998-10-21-pt1-PgS12810-6.pdf [https://perma.cc/QHZ6-TQXE] (statements of Sen. Fred Thompson and Sen. Robert Byrd) (stating it was meant "to cover all situations," it was meant to specifically overrule a D.C. Circuit opinion in *Doolin*, and it would include, among other things, being fired or put in jail).

123. S. REP. NO. 105-250, at 1.

124. *Id.* at 17; 144 CONG. REC. S12,823–24 (daily ed. Oct. 21, 1998) ("[I]n an effort to squarely address past problems, the Act specifically prohibits the use of general, 'housekeeping' statutes as a basis for circumventing the Vacancies Act. Provisions such as, but not limited to, 28 U.S.C. 509 and 510, which vest all functions of the Department of Justice in the Attorney General and allow the Attorney General to delegate responsibility for carrying out those functions, shall not be construed as providing an alternative means of filling vacancies.").

125. S. REP. NO. 105-250, at 1, 10–11.

126. *See generally id.*

127. 144 CONG. REC. S11,039 (daily ed. Sept. 28, 1998), https://www.congress.gov/crec/1998/09/28/CREC-1998-09-28-pt1-PgS11021.pdf [https://perma.cc/YQC2-XCYD] (vote on cloture 53-38); Rosenberg Memorandum, *supra* note 97, at 8.

128. Memorandum from Laurie Rubenstein to Senator Joe Lieberman (Oct. 21, 1998) [App. at A-114] ("After extensive negotiations, significant concessions to the Administration and a big, personal push by Senator Byrd, the Vacancies Reform Act was included in the Omnibus Appropriations bill.").

large Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 on the last day of the Senate's term. FVRA was enacted as Public Law No. 105-277 (112 Stat. 2681-611) on that same day, October 21, 1998, and now sits at 5 U.S.C. § 3345 *et seq*.

III. Analysis

With plain text, context, and history in mind, the root issue can now be intelligently analyzed: Does FVRA allow for either it or another office-specific succession statute to be used electively at the Executive's discretion—or does only the office-specific statute, in this case § 508, control?

The OLC, and DOJ as a whole, agrees that FVRA did not "extinguish the authority" of § 508.[129] But they argue that FVRA was intended to coexist with such statutes and function as an alternative mechanism for addressing vacancies.[130] In other words, both § 508 and FVRA are available for use at the discretion of the President, according to OLC.

OLC presents five principal reasons for its view: (1) that the term "exclusive" in FVRA's § 3347(a) means that the categories of statutes identified therein are rendered non-exclusive and that they or FVRA can be used;[131] (2) that legislative history clearly supports such a view;[132] (3) that the two statutes (FVRA and § 508) can coexist and thus do not conflict;[133] (4) that the removal of the explicit exemption language specific to the office of Attorney General shows an intent to

129. Authority of the President to Name an Acting Attorney Gen., 31 Op. O.L.C. 208, 208 (2007).

130. *See* Designating an Acting Attorney Gen., 42 Op. O.L.C., slip op. at 4 (Nov. 14, 2018), https://www.justice.gov/olc/file/1112251/download [https://perma.cc/BKP5-ASGY]; Designating an Acting Dir. of the Bureau of Consumer Fin. Prot., 41 Op. O.L.C., slip op. at 4 (Nov. 25, 2017), https://www.justice.gov/olc/file/1085611/download [https://perma.cc/KZ5U-YYQG]; Authority of the President to Name an Acting Attorney Gen., 31 Op. O.L.C. at 208; Designation of Acting Dir. of the Office of Mgmt. & Budget, 27 Op. O.L.C. 121 (2003).

131. Designating an Acting Attorney Gen., 42 Op. O.L.C., slip op. at 5–6; Designating an Acting Dir. of the Bureau of Consumer Fin. Prot., 41 Op. O.L.C., slip op. at 2; Authority of the President to Name an Acting Attorney Gen., 31 Op. O.L.C. at 209; Designation of Acting Dir. of the Office of Mgmt. & Budget, 27 Op. O.L.C. at 121 & n.1.

132. Designating an Acting Attorney Gen., 42 Op. O.L.C., slip op. at 6; Designation of Acting Dir. of the Office of Mgmt. & Budget, 27 Op. O.L.C. at 121 & n.1.

133. Authority of the President to Name an Acting Attorney Gen., 31 Op. O.L.C. at 210 n.3.

make FVRA applicable to that office;[134] and (5) that if the office of Attorney General was meant to be exempted, it would have been included in § 3349c, which excluded certain multimember and independent agencies.[135]

History and analysis will address and dispel each of these arguments below. For now, note OLC's strong reliance on FVRA's intent, structure, and legislative history as a whole to justify its own position in light of an ambiguous statutory text. Also, as the legislative history is recounted more completely below, observe how narrowly OLC limited its examination of that history, what it selectively seized as justification, and what other clear signs to the contrary were ignored.

A. Differences Between the Draft Bill and the Enacted FVRA, and OLC's Arguments

To understand what FVRA intended to accomplish, a few points within, and some differences between, its draft-bill versions and its later-enacted version are important to note.

First and foremost, it must be understood that while the sole and explicit exemption for § 508 was removed, FVRA functioned to grandfather and exempt far more office-specific succession statutes than just § 508. Substantial evidence from legislative history will be shown to support such a plain-text reading. As this evidence is introduced, consider how redundant and confusing it would have been if the only explicit office-specific exemption to FVRA, for § 508, would have remained alongside a broader categorical exemption for office-specific succession statutes that had the same effect. Would future readers and courts be confused and unnecessarily read in some sort of a difference between the two provisions?

Importantly, even more can be learned from the omission of the § 508 exemption in FVRA. The very fact that it was viewed as redundant shows that lawmakers thought that the broader categorical description in § 3347(a)(1) would be controlling, just as § 508 was. Of

134. Designating an Acting Attorney Gen., 42 Op. O.L.C., slip op. at 7 n.5; Authority of the President to Name an Acting Attorney Gen., 31 Op. O.L.C. at 209 n.1.

135. Designating an Acting Attorney Gen., 42 Op. O.L.C., slip op. at 7 n.5.

course, that intent was not any dramatic new change, it was simply an explicit continuance of the way those later-enacted and more specific statutes were already thought to supersede the Vacancies Act.[136] DOJ, GAO, the Senate, and others were in agreement on that point—and there was no reason to disturb it. Put another way, § 508 and the order of succession to Attorney General remained exempted in just the same way it had always been in the Vacancies Act since 1873. The only change was that more office-specific succession statutes were, for the first time, explicitly included in FVRA text via the categorical exemption.

Next, a look at the structure of FVRA will affirm that the location of the categorical exemption is far more consistent with having those office-specific statutes control. Separately, an examination of OLC's argument that § 3349c is the only location for specific excluded offices will show why that cannot be true.

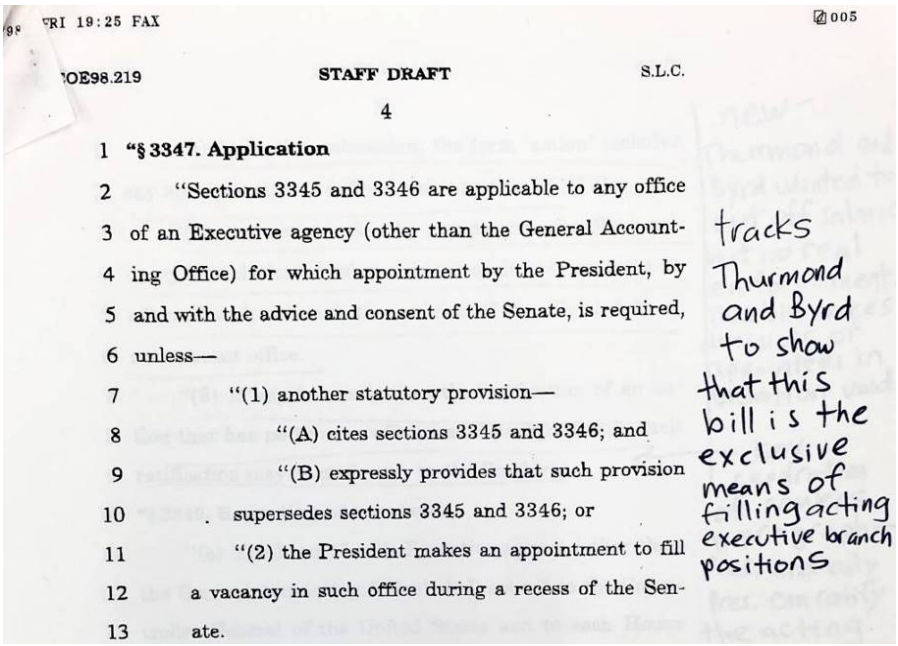
Finally, an analysis will show that OLC's interpretation of the term "exclusive" in § 3347 stretches far beyond not only a plain-text reading, but also well beyond what was clearly intended by Congress. "Exclusive" was not meant to offer an alternative choice between statutes—it was only used to ensure that DOJ could not again justify reading an exception to the new Vacancies Act for housekeeping statutes.

1. The Agreement to Retain Prior Statutes that Filled Vacancies

The beginnings of the bill that would become FVRA started after the Senate GAC's March 1998 hearings on Senator Thurmond's bill. Utilizing that bill as a template, taking into account what was learned at the hearings, and also attempting to incorporate elements of Senator Byrd's bill, Senator Thompson and GAC's Chief Counsel, Fred Ansell, wrote the initial draft of S. 2176 on April 24, 1998.[137]

136. *See* sources cited *supra* note 86.

137. Memorandum from Fred Ansell to Senator Fred Thompson, *supra* note 113 [App. at A-1, A-10].



RI 19:25 FAX 005

OE98.219 STAFF DRAFT S.L.C.

4

"§ 3347. Application

"Sections 3345 and 3346 are applicable to any office of an Executive agency (other than the General Accounting Office) for which appointment by the President, by and with the advice and consent of the Senate, is required, unless—

"(1) another statutory provision—

"(A) cites sections 3345 and 3346; and

"(B) expressly provides that such provision supersedes sections 3345 and 3346; or

"(2) the President makes an appointment to fill a vacancy in such office during a recess of the Senate.

tracks Thurmond and Byrd to show that this bill is the exclusive means of filling acting executive branch positions

Figure 4: Excerpt from a staff draft of S. 2176 within a Memorandum from Fred Ansell to Senator Thompson (Apr. 24, 1998) [App. at A-1, A-10].

That initial draft, partly reproduced above in Figure 4, would have overridden all prior succession statutes. The draft also would have attempted to exempt only one category of statutes: future-enacted statutes that expressly state they supersede the Vacancies Act.

Soon thereafter, in May 1998, Senator Thompson and Mr. Ansell involved Democratic GAC Senators and their staffs to work together on the bill and make it bipartisan.[138] The key staffer for the Democratic GAC Senators in the minority was David Plocher. Mr. Plocher circulated a memo on May 14, 1998, to the Democratic Ranking Member on GAC, Senator John Glenn, summarizing the draft bill and suggesting changes.[139] One of those summaries and suggestions stated: "We want the Act to have exclusive authority over agencies, but we

138. Memorandum from David Plocher et al. to Senator Glenn (May 14, 1998) [App. at A-16–A-17].
139. *Id.*

have no reason to override other laws. We should accept other statutes that already provide for the filling of vacancies."[140]

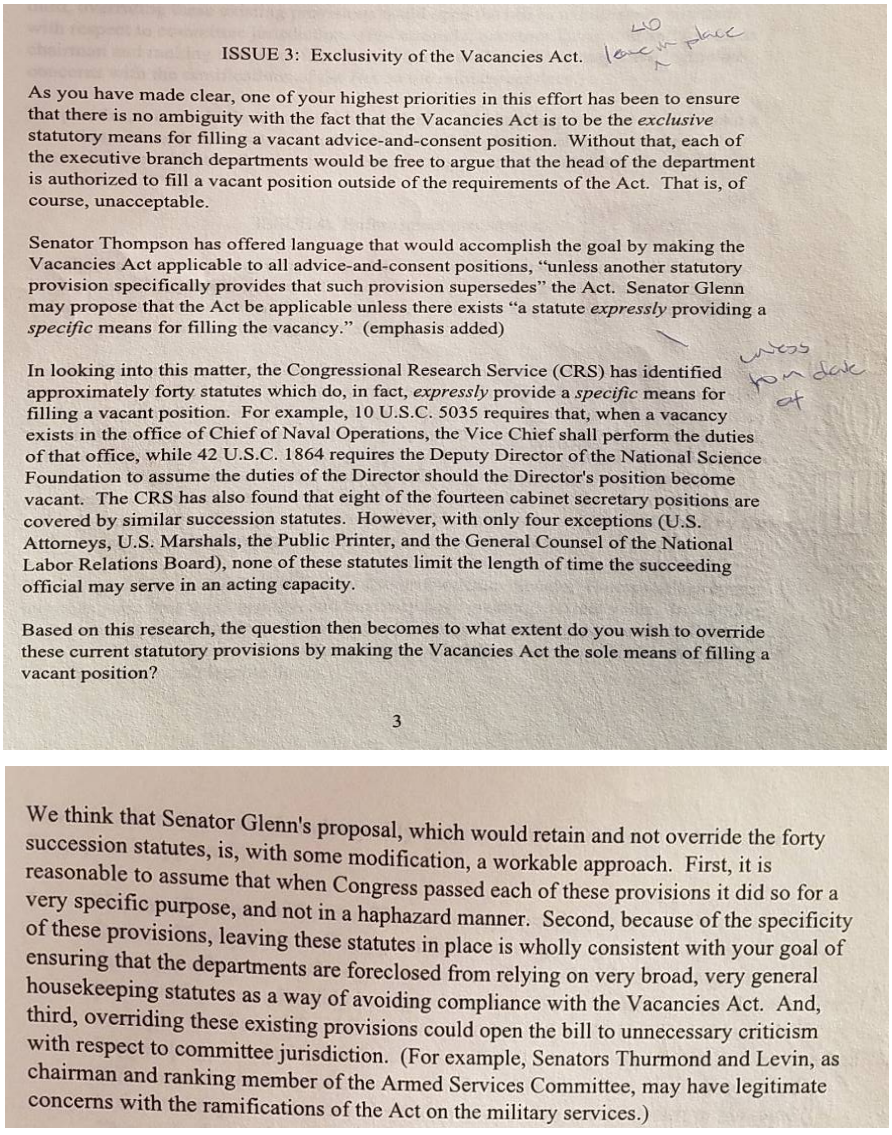
> **Exclusive Authority** -- Overrides other appointment laws unless they expressly supersede Vacancies Act *(minor edits in 2nd draft). We want the Act to have exclusive authority over agencies, but we have no reason to override other laws. We should accept other statutes that already provide for the filling of vacancies (e.g., NARA, GSA, U.S. Attorneys).*

Figure 5: An excerpt from Page 2 of a Memorandum from David Plocher et al. to Senator Glenn, re: Vacancies Act – GAC Mark-up (May 14, 1998) [App. at A-16–A-17].

Senator Glenn agreed, and by June 1, 1998, Senator Byrd and his staff were also on board with his proposal to "retain and not override the forty succession statutes."[141]

140. *Id.* [App. at A-17]; *see also id.* [App. at A-18] ("[W]e need the Act to have exclusive authority over temporary appointments, unless Congress puts into law another procedure for some office.").

141. Memorandum from Peter Kiefhaber & Paul Weinberger to Senator Robert Byrd (June 1, 1998) [App. at A-23, A-25].



ISSUE 3: Exclusivity of the Vacancies Act.

As you have made clear, one of your highest priorities in this effort has been to ensure that there is no ambiguity with the fact that the Vacancies Act is to be the *exclusive* statutory means for filling a vacant advice-and-consent position. Without that, each of the executive branch departments would be free to argue that the head of the department is authorized to fill a vacant position outside of the requirements of the Act. That is, of course, unacceptable.

Senator Thompson has offered language that would accomplish the goal by making the Vacancies Act applicable to all advice-and-consent positions, "unless another statutory provision specifically provides that such provision supersedes" the Act. Senator Glenn may propose that the Act be applicable unless there exists "a statute *expressly* providing a *specific* means for filling the vacancy." (emphasis added)

In looking into this matter, the Congressional Research Service (CRS) has identified approximately forty statutes which do, in fact, *expressly* provide a *specific* means for filling a vacant position. For example, 10 U.S.C. 5035 requires that, when a vacancy exists in the office of Chief of Naval Operations, the Vice Chief shall perform the duties of that office, while 42 U.S.C. 1864 requires the Deputy Director of the National Science Foundation to assume the duties of the Director should the Director's position become vacant. The CRS has also found that eight of the fourteen cabinet secretary positions are covered by similar succession statutes. However, with only four exceptions (U.S. Attorneys, U.S. Marshals, the Public Printer, and the General Counsel of the National Labor Relations Board), none of these statutes limit the length of time the succeeding official may serve in an acting capacity.

Based on this research, the question then becomes to what extent do you wish to override these current statutory provisions by making the Vacancies Act the sole means of filling a vacant position?

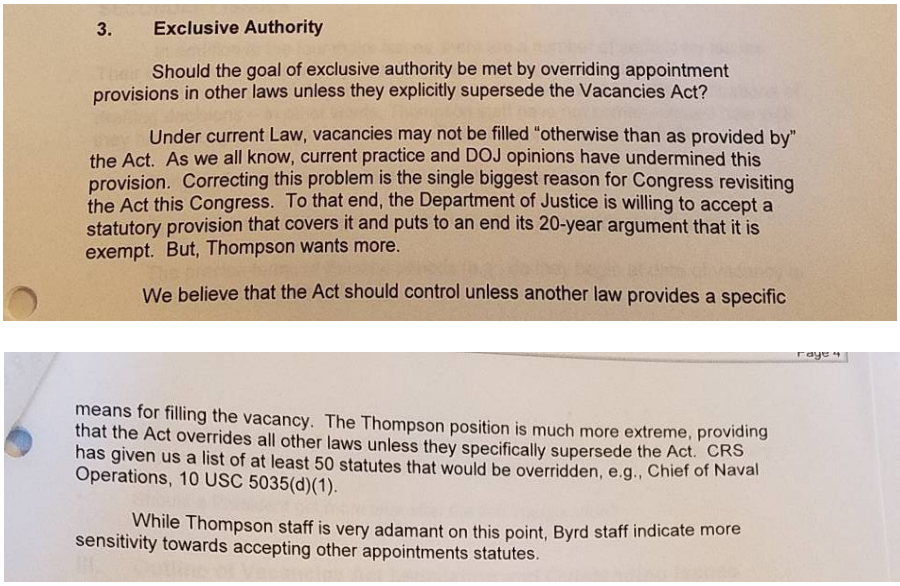
3

We think that Senator Glenn's proposal, which would retain and not override the forty succession statutes, is, with some modification, a workable approach. First, it is reasonable to assume that when Congress passed each of these provisions it did so for a very specific purpose, and not in a haphazard manner. Second, because of the specificity of these provisions, leaving these statutes in place is wholly consistent with your goal of ensuring that the departments are foreclosed from relying on very broad, very general housekeeping statutes as a way of avoiding compliance with the Vacancies Act. And, third, overriding these existing provisions could open the bill to unnecessary criticism with respect to committee jurisdiction. (For example, Senators Thurmond and Levin, as chairman and ranking member of the Armed Services Committee, may have legitimate concerns with the ramifications of the Act on the military services.)

Figure 6: Excerpts from a Memorandum from Peter Kiefhaber and Paul Weinberger to Senator Byrd (June 1, 1998) [App. at A-23, A-26].

When Senator Thompson was ready to bring his bill before his committee, he arranged a meeting between himself, Senator Glenn,

and both of their staffs to work out key issues.[142] On June 2, 1998, in advance of that arranged meeting, Mr. Plocher summarized the issues to be reconciled. Among them was the exclusivity of the law.[143] The Democrats' proposal was that "the Act should control unless another law provides a specific means for filling the vacancy."[144]



3. **Exclusive Authority**

Should the goal of exclusive authority be met by overriding appointment provisions in other laws unless they explicitly supersede the Vacancies Act?

Under current Law, vacancies may not be filled "otherwise than as provided by" the Act. As we all know, current practice and DOJ opinions have undermined this provision. Correcting this problem is the single biggest reason for Congress revisiting the Act this Congress. To that end, the Department of Justice is willing to accept a statutory provision that covers it and puts to an end its 20-year argument that it is exempt. But, Thompson wants more.

We believe that the Act should control unless another law provides a specific

means for filling the vacancy. The Thompson position is much more extreme, providing that the Act overrides all other laws unless they specifically supersede the Act. CRS has given us a list of at least 50 statutes that would be overridden, e.g., Chief of Naval Operations, 10 USC 5035(d)(1).

While Thompson staff is very adamant on this point, Byrd staff indicate more sensitivity towards accepting other appointments statutes.

Figure 7: Excerpts of a memo from minority GAC Counsel to Senator Glenn (June 2, 1998) [App. at A-28, A-30–A-31].

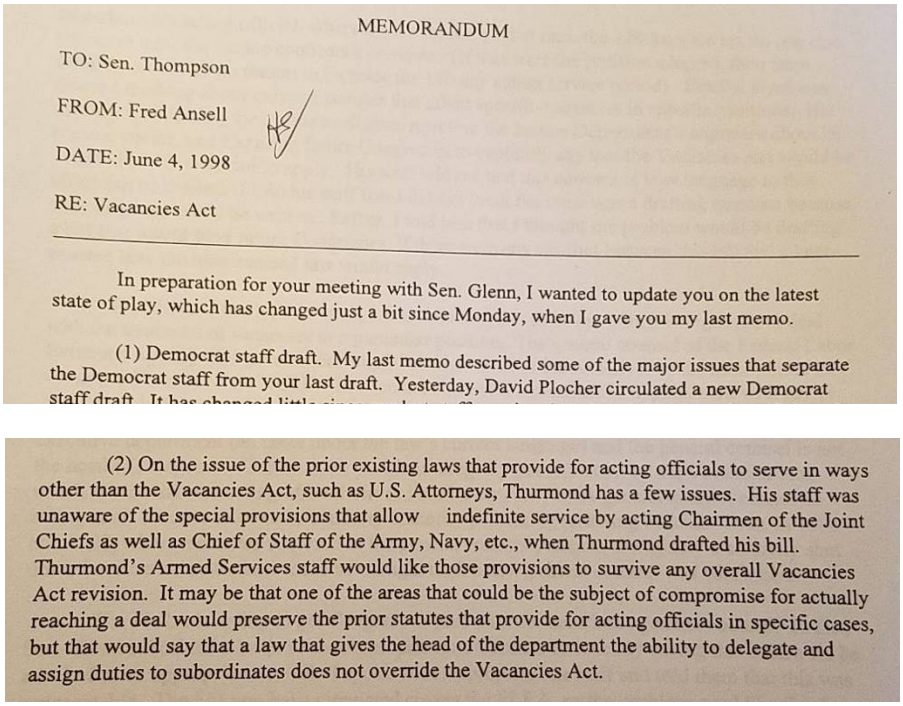
By June 4, 1998, GAC Chief Counsel Fred Ansell recommended to Senator Thompson that he accept the proposal, especially after learning that Senator Thurmond wanted automatic succession provisions affecting the military "to survive any overall Vacancies Act

142. Memorandum from Fred Ansell to Senator Fred Thompson (May 22, 1998) (on file with the Georgia State University Law Review) (a staff memo suggesting that Senator Thompson seek a meeting with Ranking Member Senator "Glenn to determine what bill to amend the Vacancies Act that he would support . . . after the recess [which would end June 1]."); Memorandum from Debbie Lehrich to Democratic Staff (June 5, 1998) [App. at A-53].

143. Memorandum from David Plocher & Debbie Lehrich to Senator John Glenn (June 2, 1998) [App. at A-30–A-31]; Memorandum from David Plocher et al. to Senator Glenn, *supra* note 138.

144. *Id.*

revision."[145] Mr. Ansell also recommended that to reach an overall deal, a point of compromise needed to be made to "preserve the prior statutes that provide for acting officials in specific cases, but one that said that a law that gives the head of the department the ability to delegate and assign duties to subordinates does not override the Vacancies Act."[146]



MEMORANDUM

TO: Sen. Thompson

FROM: Fred Ansell

DATE: June 4, 1998

RE: Vacancies Act

In preparation for your meeting with Sen. Glenn, I wanted to update you on the latest state of play, which has changed just a bit since Monday, when I gave you my last memo.

(1) Democrat staff draft. My last memo described some of the major issues that separate the Democrat staff from your last draft. Yesterday, David Plocher circulated a new Democrat staff draft. It has changed little

(2) On the issue of the prior existing laws that provide for acting officials to serve in ways other than the Vacancies Act, such as U.S. Attorneys, Thurmond has a few issues. His staff was unaware of the special provisions that allow indefinite service by acting Chairmen of the Joint Chiefs as well as Chief of Staff of the Army, Navy, etc., when Thurmond drafted his bill. Thurmond's Armed Services staff would like those provisions to survive any overall Vacancies Act revision. It may be that one of the areas that could be the subject of compromise for actually reaching a deal would preserve the prior statutes that provide for acting officials in specific cases, but that would say that a law that gives the head of the department the ability to delegate and assign duties to subordinates does not override the Vacancies Act.

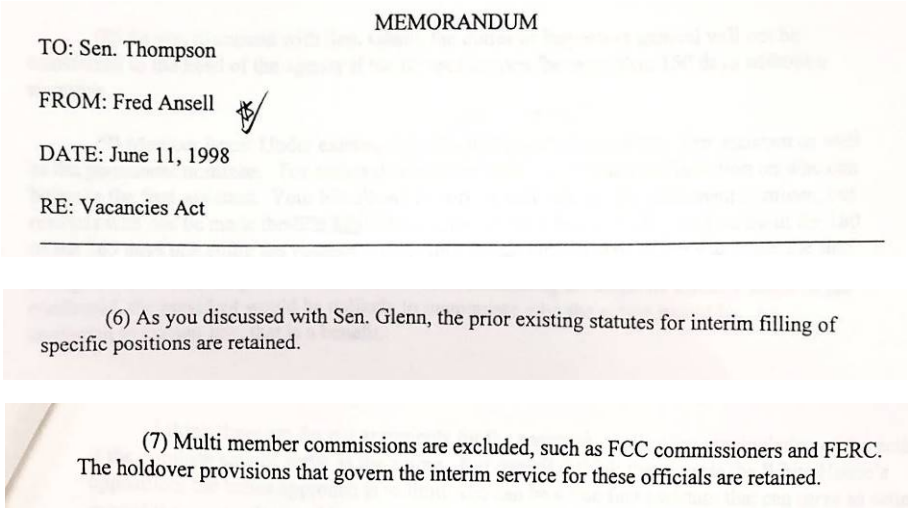
Figure 8: Memorandum from Fred Ansell to Senator Thompson [App. at A-43].

A Democratic staff memo, written just ahead of the meeting and dated June 5, read: "Major Issues—that we should be able to agree on. . . . We should not override other laws already passed by Congress that have temporary appointment procedures. We should 'grandfather'

145. Memorandum from Fred Ansell to Senator Fred Thompson (June 4, 1998) [App. at A-44].
146. *Id.*

existing laws that have specific provisions for filling vacancies and make the Vacancies Act exclusive from now on."[147]

As expected by both sides, the June 5 meeting resulted in agreement on the issue of the prior statutes.[148] In describing the outcome of that meeting, staffers for both the majority and minority confirmed that a consensus was reached.[149] GAC Chief Counsel Fred Ansell echoed this point of agreement to Senator Thompson in a later memo: "As you discussed with Sen. Glenn, the prior existing statutes for interim filling of specific positions are retained."[150]



MEMORANDUM

TO: Sen. Thompson

FROM: Fred Ansell

DATE: June 11, 1998

RE: Vacancies Act

(6) As you discussed with Sen. Glenn, the prior existing statutes for interim filling of specific positions are retained.

(7) Multi member commissions are excluded, such as FCC commissioners and FERC. The holdover provisions that govern the interim service for these officials are retained.

Figure 9: An update memo from the GAC Chief Counsel to Senator Thompson [App. at A-56, A-57].

Significantly, in that June 11 memo by Mr. Ansell, the same term "retained" that was used to describe prior statutes in § 3347 was also used to describe another section of the bill § 3349b: "The holdover provisions that govern the interim service for these officials are

147. Memorandum from David Plocher on Vacancy Act Talking Points (June 5, 1998) [App. at A-51–A-52].

148. Memorandum from Debbie Lehrich to Democratic Staff (June 5, 1998) [App. at A-53].

149. *Id.*

150. Memorandum from Fred Ansell to Senator Fred Thompson (June 11, 1998) [App. at A-57].

retained."[151] Even from that time, and all the way through enactment, the section of the bill Mr. Ansell was describing as "retained," § 3349b, did not relevantly change: "[FVRA] shall not be construed to affect any statute that [meets a certain description]."[152] Clearly then, "retained" meant, at the very least, not affected by FVRA.[153]

This description of "retained" is highly relevant to how the staff, Senate, and all of Congress understood the effect of FVRA and what the original June 5 agreement intended to accomplish. From the June 11 memo, and the reference to the other sections whose text even more clearly exempted certain statutes of FVRA, it is clear that "retained"[154] was understood to mean preserved, grandfathered, and exempted, which were also used interchangeably by other Senators and staff.[155] Moreover, as seen above, in all of the agreements and negotiations on that point, there was not so much as even a hint that FVRA might function as an alternative to any of the "retained" statutes.

All told, the agreement by both the Chairman and Ranking Member of GAC and their staffs to preserve and grandfather certain statutes resulted in what would later be enacted as § 3347(a)(1)(A). The

151. *Id.* (emphasis added).

152. *Compare* S. 2176, 105th Cong. § 2 (1998), https://www.congress.gov/105/bills/s2176/BILLS-105s2176is.pdf [https://perma.cc/DNA2-7RWE], *with* 5 U.S.C. § 3349b (2018) (no change in excerpted text).

153. It also puts away DOJ's structural argument that only § 3349c lists excluded offices and that because the Attorney General was not among those listed, it was not exempted.

154. *Cf. Retained*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/retained [https://perma.cc/95XD-7ZD6] (last visited Jan. 15, 2020) ("to keep in possession or use").

155. An undated memorandum was found in the archives of Senator Thompson that further supports the understanding of the "retained" statutes as solely controlling. The memo, found paginated after and stapled to Senator Thompson's remarks for the Senate's September 28, 1998 cloture vote on FVRA, refuted talking points provided by the White House around July 28, 1998, that opposed the FVRA bill. *See infra* note 310. Presumably written by the same staffer that authored FVRA, Fred Ansell, the memo stated:

> The bill would not affect positions of national importance, such as national security, health and safety, financial stability, or law enforcement. The bill retains the operation of statutes Congress has passed that govern vacancies in particular positions of this sort. The chairman of the joint chiefs of staff, and United States attorneys, for example, will not be covered by this bill.

Responses to Administration Talking Points (1998) (on file with the Georgia State University Law Review). Thus, even as late as September 1998, the principal authors of FVRA stated that the FVRA would not "cover" office-specific succession statutes, which were at the same time still described as "retained."

agreement resulted in subsections (a)(2) and (b), as shown below with additions to the contemporaneous draft in italics:

> § 3347. Application
>
> ➢ Sections 3345 and 3346 are applicable to any office . . . unless—
>
> (1) another statutory provision expressly provides that such provision supersedes sections 3345 and 3346;
>
> *(2) a statutory provision in effect on the date of enactment of the Federal Vacancies Reform Act of 1998 expressly authorizes the President, or the head of an Executive department, to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity; or*
>
> (3) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.
>
> *(b) Any statutory provision providing general authority to the head of an Executive agency . . . to delegate duties to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(2) applies.*[156]

Senator Thomson first formally introduced this version to the Senate and GAC as S. 2176 on June 16, 1998.[157] In describing the bill in an introductory floor statement to the Senate, Senator Thompson affirmed that the intent was to "preserve" the "laws already on the books that

156. S. 2176 (as introduced in the Senate on June 16, 1998).
157. *Id.*

provide a process by which persons can serve as acting officers when particular offices are vacant."[158]

With this context, see how the whole section essentially read at the time:

- FVRA is applicable, unless a certain prior succession statute exists.

Under that presentation and plain-text reading, it is entirely clear that FVRA is *inapplicable* when another statute already exists. That was what Senators were introduced to and that was what they voted on. And that necessary understanding of FVRA's *inapplicability* was confirmed by other senators, staffs, written summaries on the agreement, and even the statements of the bill's author on the Senate floor describing what the draft § 3347 would do.[159]

Note, too, the context and structure of what else was *inapplicable* within that same § 3347: (1) a later-enacted statute that expressly states it supersedes FVRA, and (3) a recess appointment. No reasonable person would think that FVRA could be used as an alternative when an express prohibition would be enacted in a future statute, as in draft paragraph (1). Indeed, Senator Thompson himself described that paragraph as "overriding" his law.[160] And it would be a non-starter that via paragraph (3), Congress would be able to displace the Constitution and render its text on recess appointments meaningless. But sandwiched right in the middle of those two clearly superseding or

158. 144 CONG. REC. S6414 (daily ed. June 16, 1998), https://www.congress.gov/crec/1998/06/16/CREC-1998-06-16-pt1-PgS6405-3.pdf [https://perma.cc/FLS2-K2CU] (Sen. Fred Thompson's introductory statement on S. 2176, stating: "Nonetheless, we do not write on a clean slate. There are a number of *laws already on the books* that provide a process by which persons can serve as acting officers when particular offices are vacant. In most instances, these officials can serve until a successor is confirmed, *without regard to the Vacancies Act*. The bill *preserves those specific statutes*, but, to clearly reject the position of the Justice Department, it expressly repudiates the contention that a law authorizing the head of a department to delegate or reassign duties among other officers is a statute that provides for the temporary filling of a specific office." (emphases added)).

159. *Id.*

160. 144 CONG. REC. S6414 (daily ed. June 16, 1998) ("For the future, Congress will have to expressly provide that it is superseding the Vacancies Act if it wishes to override the Vacancies Act as to the temporary filling of advise [sic] and consent provisions.").

"overriding" provisions was paragraph (2): the agreed-upon category of preserved statutes.

Consequently, as the agreement to preserve certain succession statutes was first written in S. 2176 as introduced, no reasonable senator would ever believe that FVRA could ever be used as an alternative to any of those options. Moreover, such an alternative would have marked a dramatic shift from the prior practice. And, as a giant change, that elephant would have attracted at least some discussion.[161] Instead, there is absolutely no evidence that Congress thought that was what it considered.

2. Adding Another Broad Exemption in § 3347 to Cover § 508 and Similar Laws

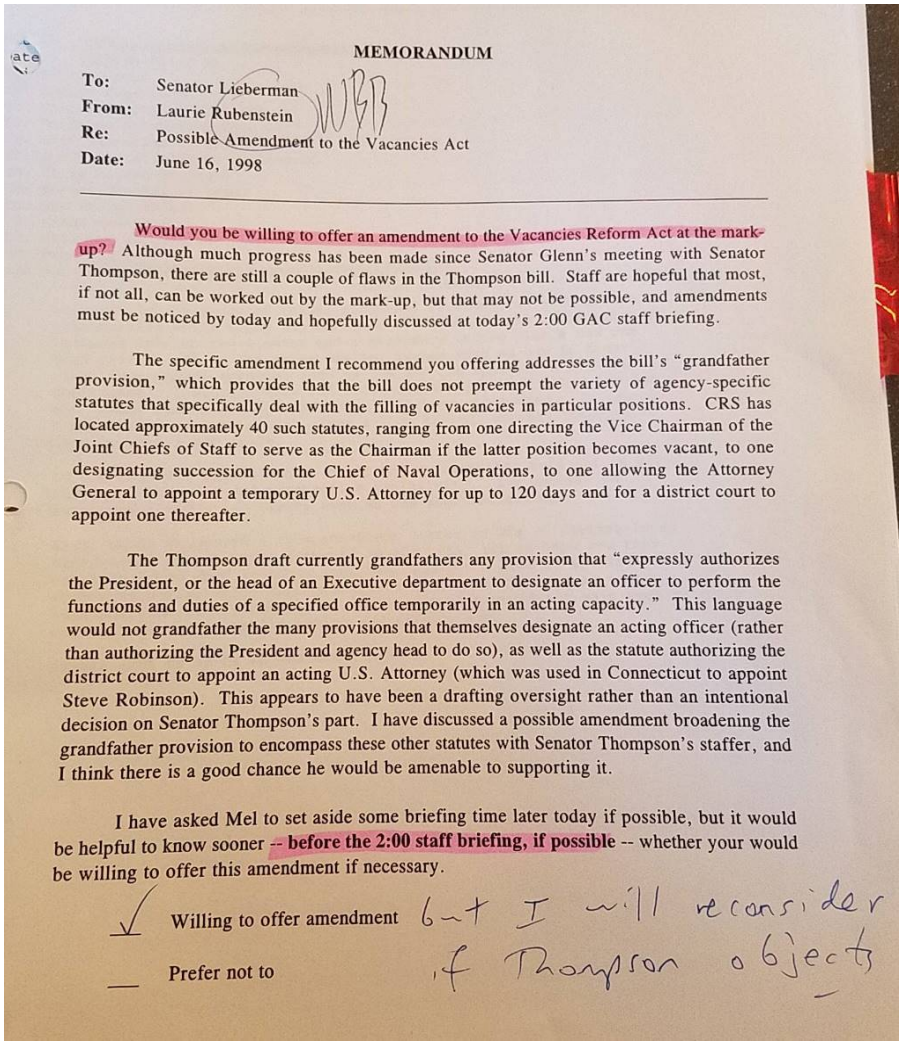
The first formally introduced version of S. 2176 implemented a consensus by all sides to preserve and grandfather existing succession statutes, such as the ones affecting military succession statutes that Senator Thurmond and others wanted preserved.[162]

But soon after that bill was viewed by GAC Democratic staff, they noticed that the language did not exempt certain types of statutes both sides agreed to keep as controlling. To fix what was called a "flaw" and a "drafting oversight rather than an intentional decision on Senator Thompson's part," GAC counsel Laurie Rubenstein explained the situation to Senator Lieberman, and he agreed to offer an amendment to ensure that the law would "grandfather the many provisions that themselves designate an acting officer (rather than authorizing the President and agency head to do so)."[163]

161. *E.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1626–27 (2018) ("[T]he usual rule [is] that Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'" (quoting Whitman v. Am. Trucking Ass'ns., Inc., 531 U.S. 457, 468 (2001))).

162. S. 2176 (as introduced in the Senate on June 16, 1998).

163. Memorandum from Laurie Rubenstein to Senator Lieberman (June 16, 1998) [App. at A-65].



MEMORANDUM

To: Senator Lieberman
From: Laurie Rubenstein
Re: Possible Amendment to the Vacancies Act
Date: June 16, 1998

Would you be willing to offer an amendment to the Vacancies Reform Act at the mark-up? Although much progress has been made since Senator Glenn's meeting with Senator Thompson, there are still a couple of flaws in the Thompson bill. Staff are hopeful that most, if not all, can be worked out by the mark-up, but that may not be possible, and amendments must be noticed by today and hopefully discussed at today's 2:00 GAC staff briefing.

The specific amendment I recommend you offering addresses the bill's "grandfather provision," which provides that the bill does not preempt the variety of agency-specific statutes that specifically deal with the filling of vacancies in particular positions. CRS has located approximately 40 such statutes, ranging from one directing the Vice Chairman of the Joint Chiefs of Staff to serve as the Chairman if the latter position becomes vacant, to one designating succession for the Chief of Naval Operations, to one allowing the Attorney General to appoint a temporary U.S. Attorney for up to 120 days and for a district court to appoint one thereafter.

The Thompson draft currently grandfathers any provision that "expressly authorizes the President, or the head of an Executive department to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity." This language would not grandfather the many provisions that themselves designate an acting officer (rather than authorizing the President and agency head to do so), as well as the statute authorizing the district court to appoint an acting U.S. Attorney (which was used in Connecticut to appoint Steve Robinson). This appears to have been a drafting oversight rather than an intentional decision on Senator Thompson's part. I have discussed a possible amendment broadening the grandfather provision to encompass these other statutes with Senator Thompson's staffer, and I think there is a good chance he would be amenable to supporting it.

I have asked Mel to set aside some briefing time later today if possible, but it would be helpful to know sooner -- **before the 2:00 staff briefing, if possible** -- whether your would be willing to offer this amendment if necessary.

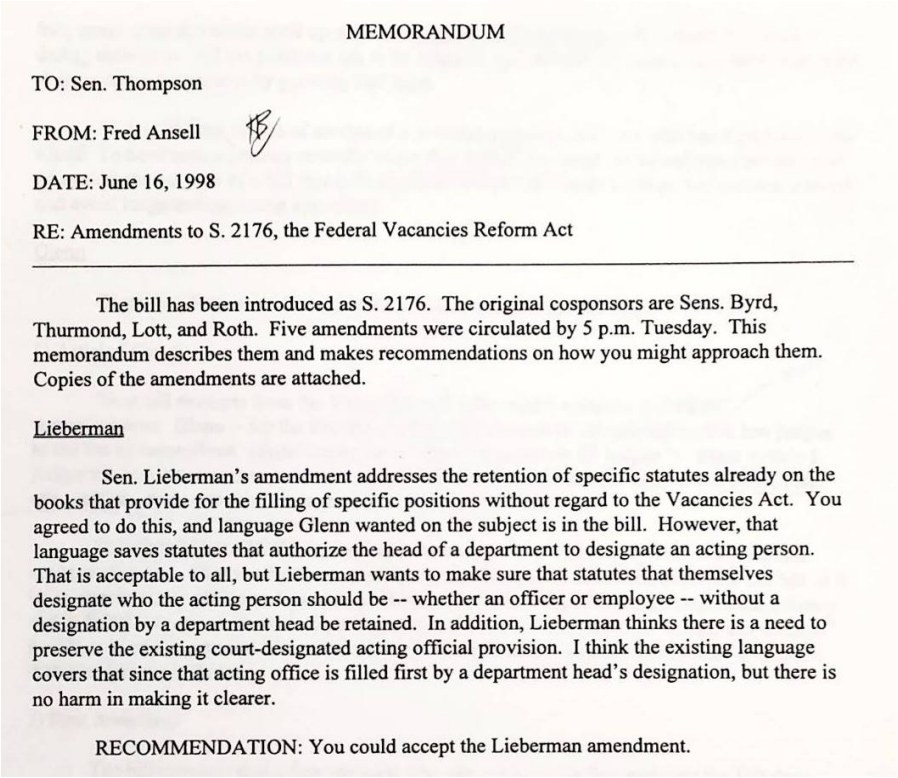
✓ Willing to offer amendment but I will reconsider if Thompson objects

___ Prefer not to

Figure 10: Memorandum from Laurie Rubenstein to Senator Lieberman (June 16, 1998) [App. at A-65].

The amendment was offered on June 16, shortly before the amendment deadline that day, and was discussed at a GAC staff briefing later that afternoon. It was one of five amendments offered before the deadline and the only one that GAC Chief Counsel Fred

Ansell recommended that Senator Thompson accept.[164] In explaining the amendment that would add what is now § 3347(a)(1)(B), Mr. Ansell again described these statutes as "retained" and reminded Senator Thompson that he "agreed to do this, and language Glenn wanted on the subject is in the bill. . . . but Lieberman wants to make sure that statutes that themselves designate who the acting person should be . . . be retained."[165]



MEMORANDUM

TO: Sen. Thompson

FROM: Fred Ansell

DATE: June 16, 1998

RE: Amendments to S. 2176, the Federal Vacancies Reform Act

The bill has been introduced as S. 2176. The original cosponsors are Sens. Byrd, Thurmond, Lott, and Roth. Five amendments were circulated by 5 p.m. Tuesday. This memorandum describes them and makes recommendations on how you might approach them. Copies of the amendments are attached.

Lieberman

Sen. Lieberman's amendment addresses the retention of specific statutes already on the books that provide for the filling of specific positions without regard to the Vacancies Act. You agreed to do this, and language Glenn wanted on the subject is in the bill. However, that language saves statutes that authorize the head of a department to designate an acting person. That is acceptable to all, but Lieberman wants to make sure that statutes that themselves designate who the acting person should be -- whether an officer or employee -- without a designation by a department head be retained. In addition, Lieberman thinks there is a need to preserve the existing court-designated acting official provision. I think the existing language covers that since that acting office is filled first by a department head's designation, but there is no harm in making it clearer.

RECOMMENDATION: You could accept the Lieberman amendment.

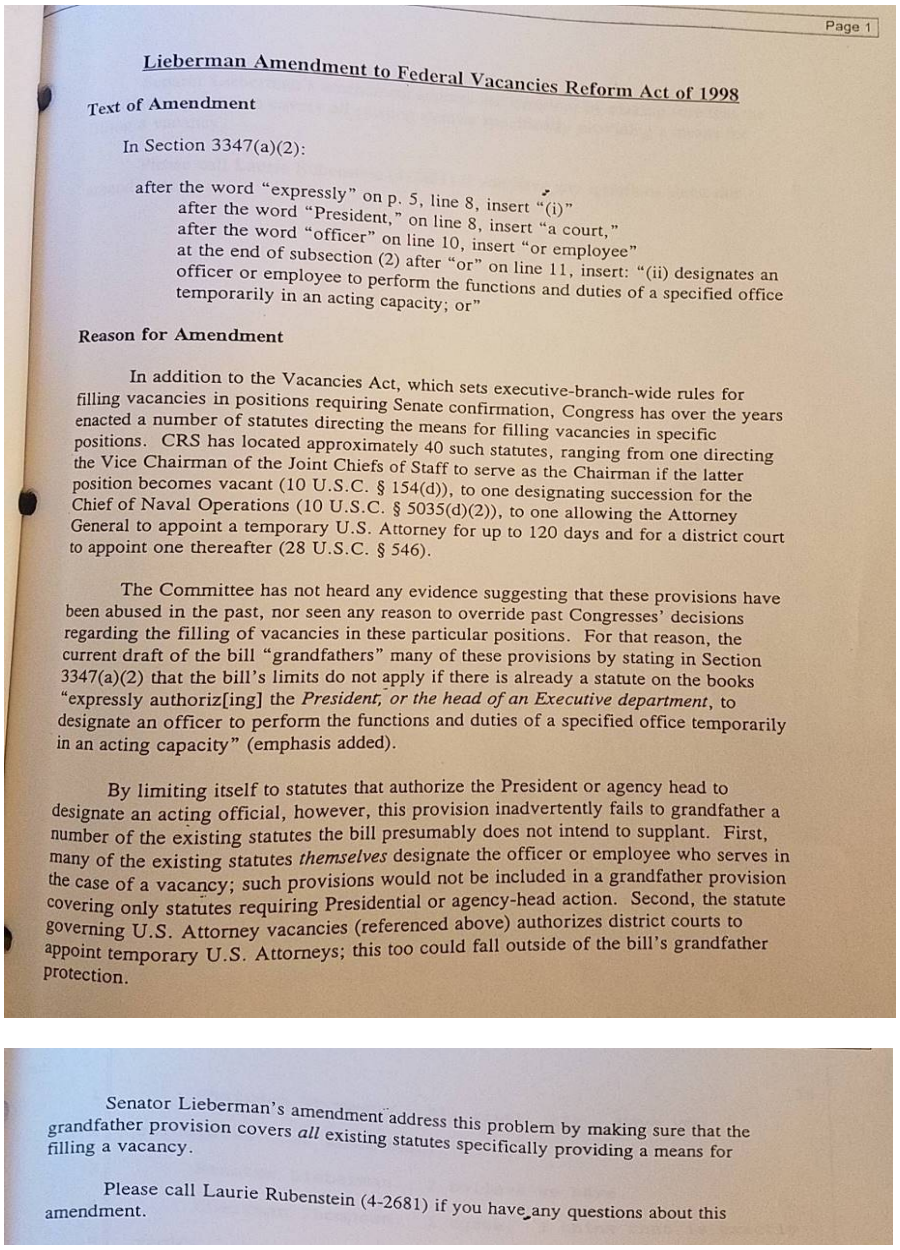
Figure 11: Memorandum for Senator Thompson from Fred Ansell, re: Amendments to S. 2176, the Federal Vacancies Reform Act (June 16, 1998) [App. at A-60].

164. Memorandum from Fred Ansell to Senator Fred Thompson (June 16, 1998) [App. at A-61].
165. *Id.*

When the GAC gathered for a business meeting on June 17, 1998, every senator there was aware of the amendment. They had not only been briefed by their staffs in advance, but they also were given a roughly one-page description of the amendment and the rationale for it.[166] This meant that each GAC senator believed they were voting to have FVRA function the way it was explained and memorialized in that one-page memorandum. That same explanation was also circulated during the GAC business meeting, was included in the official transcript of that meeting, and is reproduced below. In relevant part, it reads:

> Congress has over the years enacted a number of statutes directing the means for filling vacancies in specific positions. CRS has located approximately 40 such statutes . . . . The Committee has not heard any evidence suggesting that these provisions have been abused in the past, nor seen any reason to override past Congresses' decisions . . . . For that reason, the current draft 'grandfathers' many of these provisions . . . in Section 3347(a)(2) . . . . however, this provision inadvertently fails to grandfather a number of the existing statutes that the bill presumably does not intend to supplant. . . . Senator Liberman's amendment address this problem by making sure that the grandfather provision covers *all* existing statutes specifically providing a means for filling a vacancy.[167]

166. Transcript of June 17th GAC Meeting, *supra* note 86 [App. at A-77].
167. *Id.* [App. at A-66, A-77–A-78].



Page 1

Lieberman Amendment to Federal Vacancies Reform Act of 1998

Text of Amendment

In Section 3347(a)(2):

after the word "expressly" on p. 5, line 8, insert "(i)"
after the word "President," on line 8, insert "a court,"
after the word "officer" on line 10, insert "or employee"
at the end of subsection (2) after "or" on line 11, insert: "(ii) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or"

Reason for Amendment

In addition to the Vacancies Act, which sets executive-branch-wide rules for filling vacancies in positions requiring Senate confirmation, Congress has over the years enacted a number of statutes directing the means for filling vacancies in specific positions. CRS has located approximately 40 such statutes, ranging from one directing the Vice Chairman of the Joint Chiefs of Staff to serve as the Chairman if the latter position becomes vacant (10 U.S.C. § 154(d)), to one designating succession for the Chief of Naval Operations (10 U.S.C. § 5035(d)(2)), to one allowing the Attorney General to appoint a temporary U.S. Attorney for up to 120 days and for a district court to appoint one thereafter (28 U.S.C. § 546).

The Committee has not heard any evidence suggesting that these provisions have been abused in the past, nor seen any reason to override past Congresses' decisions regarding the filling of vacancies in these particular positions. For that reason, the current draft of the bill "grandfathers" many of these provisions by stating in Section 3347(a)(2) that the bill's limits do not apply if there is already a statute on the books "expressly authoriz[ing] the *President, or the head of an Executive department*, to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity" (emphasis added).

By limiting itself to statutes that authorize the President or agency head to designate an acting official, however, this provision inadvertently fails to grandfather a number of the existing statutes the bill presumably does not intend to supplant. First, many of the existing statutes *themselves* designate the officer or employee who serves in the case of a vacancy; such provisions would not be included in a grandfather provision covering only statutes requiring Presidential or agency-head action. Second, the statute governing U.S. Attorney vacancies (referenced above) authorizes district courts to appoint temporary U.S. Attorneys; this too could fall outside of the bill's grandfather protection.

Senator Lieberman's amendment address this problem by making sure that the grandfather provision covers *all* existing statutes specifically providing a means for filling a vacancy.

Please call Laurie Rubenstein (4-2681) if you have any questions about this amendment.

Figure 12: Excerpt from Transcript of Proceedings, U.S. Senate Committee on Governmental Affairs Business Meeting June 17, 1998 [App. at A-66, A-77–A-78].

Put simply, there was no ambiguity as to what the provision would do. Every senator on the committee was told that the amendment that would become § 3347(a)(1)(B) would ensure that statutes that designate a successor would *not* be "overridden"—and that the bill "does not intend to supplant"[168] such statutes. Instead, such provisions would be "grandfathered."

In other words, at the time when the senators were voting on the amendment and on whether to send the bill to the whole Senate, no senator could have reasonably believed, based on the text of the law and the description of what it would do, that such "grandfathered" statutes could occasionally be overridden at the election of the President. The clear definition and understanding of "grandfathered" was "a provision that creates an *exemption* from the law's effect."[169]

But as if all that did not provide enough clarity about the provision and the section as whole, more was offered. In addition to the staff briefs, prior agreements, and the circulated summary, Senator Lieberman also orally described the amendment and its purpose to all of the Committee at the meeting on June 17, 1998:

> Very briefly, in its wisdom, in our wisdom, Congress has over the years exempted a number of positions, as you indicated earlier, from the Vacancies Act by providing a specific way to designate a replacement. The proposal that the Committee has brought forward in the Vacancies Act here makes clear that it is not our intention to override those specific judgments by previous Congresses that have taken different positions out of the Vacancies Act.
>
> For instance, one that comes to mind—and these are normally authorization committees that do this. The Armed

168. According to Merriam-Webster, "supplant" means "to take the place of and serve as a substitute for." *Supplant*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/supplant [https://perma.cc/SUK2-GT46] (last visited Jan. 17, 2019).

169. *Grandfather Clause*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added) ("A provision that creates an exemption from the law's effect for something that existed before the law's effective date; specif., a statutory or regulatory clause that exempts a class of persons or transactions because of circumstances existing before the new rule or regulation takes effect.").

> Services Committee, in its wisdom, has passed a statute that says if the Chairman of the Joint Chiefs of Staff vacates the office, the Vice Chairman becomes the Chairman until someone is qualified to replace him.
>
> The proposal before us exempts from the purview of the changes made in it appointments that—statutes in which the President or the head of an executive department is expressly authorized to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity.
>
> I believe inadvertently what is omitted here is another way this happens, which is statutes that expressly designate an individual to fill the vacancy as opposed to giving somebody the authority to designate a replacement. And my amendment simply would add that to the so-called grandfather provision of the statute.[170]

Just before the Committee adopted the amendment *unanimously*, Senator Thompson remarked, "I agree. I think that is exactly right."[171] With those explanations freshly in mind, the Committee would vote 9–1 to advance the bill to the whole Senate at the end of that same meeting.[172]

A few weeks after Senator Lieberman verbally described his amendment as "grandfathering" and "exempting" the statutes he described, the Senate Report would again use the term "retain" to describe the same statutes that "by their own terms" fill vacancies, again suggesting no other terms could fill those particular offices:

---

170. Transcript of June 17th GAC Meeting, *supra* note 86 [App. at A-75–A-76, A-79].

171. *Id.* at 35.

172. S. REP. NO. 105-250, at 11 (1998) ("Senator Lieberman offered an amendment to retain existing statutes that by their own terms provide a process for the filling of specific advice and consent positions . . . . That amendment was agreed to by voice vote. . . . [describing other amendments]. With no other amendments being offered, Chairman Thompson moved adoption of S. 2176 as amended. The bill was ordered favorably reported by a vote of 9 Yeas . . . and 1 Nay[.]").

> Senator Lieberman offered an amendment to retain existing statutes that *by their own terms* provide a process for the filling of specific advice and consent positions [§ 3347(a)(1)(B)-type statutes], as well as the statues [sic] referenced in S. 2176 as introduced, which preserved existing statutes that allow the heads of departments to designate an acting official [(1)(A)-type statutes]. That amendment was agreed to by voice vote.[173]

Senator Thompson—the primary author, shepherd, and decision-maker of FVRA and its text—did not at all diverge from what he, Senators Glenn and Lieberman, and in fact the *entire* committee had agreed to. Only a few hours before the Senate would vote on ending debate on his bill to preclude a filibuster—a 53–38 vote in favor that did not reach the required three-fifths by only two votes—Senator Thompson explained to the Senate that FVRA would cover all Senate-confirmed offices, *except* the ones grandfathered:

> The bill will extend the provisions of the Vacancies Act to cover all advice and consent positions in executive Agencies *except* those that are covered by *express specific statute* that provide for acting officers to carry out the functions and duties of the office.[174]

Again, no mention was made of FVRA functioning as alternatives to those express specific statutes. To faithfully recast Senator Thompson's statement: If all positions are covered by the Vacancies Act "except" certain ones, then those certain ones *are not covered*.[175]

---

173. *Id.* (emphases added).

174. 144 CONG. REC. S11,022–23 (daily ed. Sept. 28, 1998) (emphases added), https://www.congress.gov/crec/1998/09/28/CREC-1998-09-28-pt1-PgS11021.pdf [https://perma.cc/9PYL-EUCM].

175. Furthermore, Senator Thompson's very next sentence in that explanation to the Senate said: "The bill also exempts multimember commissions, and it retains holdover provisions of current law." *Id.* at S11,023. The use of "also exempts" highlights his preceding statement that express specific statutes are not covered. *See id; see also supra* note 155 (Thompson's GAC chief counsel offering talking points—made after the manager's amendment phrasing change to § 3347(a) was agreed to—that explained FVRA would not "cover" the office-specific succession statutes whose operations were

If, somehow, the provision was still unclear, another floor statement by Senator Thompson in January 1999, which described a technical fix to § 3347 and would be enacted later that year,[176] should put to rest any pittance of doubt:

> [S]ection 3347 of that statute [FVRA] made clear that so-called vesting and delegation statutes . . . do not constitute statutes providing for the filling of a specific vacant position that the law retains *in lieu of* the procedures contained in the Federal Vacancies Reform Act.[177]

Obviously, if a law is "retained" "*in lieu of*" FVRA, it means that it is to be used *instead of* FVRA.[178] Another way of putting that, as the written description of Senator Lieberman's amendment did, is that such statutes *cannot be* "overridden" or "supplanted" in favor of using FVRA.[179] Or, as Senator Lieberman's verbal explanation put even more succinctly: the described statutes in § 3347(a) are "*exempted.*"[180]

Look now at how the GAC-reported bill read from June 17 to September 28, the day the Senate cast 53 votes in favor of moving forward on the bill:

> § 3347. Application.
>
> (a) Sections 3345 and 3346 are applicable to any office . . . unless—

"retained").

176. Act of May 21, 1999, Pub. L. No. 106-31, tit. V, § 5011, 113 Stat. 57, 112.

177. 145 Cong. Rec. S33 (daily ed. Jan. 6, 1999) (emphasis added), https://www.congress.gov/crec/1999/01/06/CREC-1999-01-06-pt1-PgS33-3.pdf [https://perma.cc/3H63-S2DH] (statement of Sen. Fred Thompson).

178. According to Merriam-Webster, "in lieu of" means "in the place of; instead of." *Lieu*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/lieu [https://perma.cc/5C4Q-M783] (last visited Dec. 7, 2019).

179. Transcript of June 17th GAC Meeting, *supra* note 86 [App. at A-77].

180. *Id.* [App. at A-75].

(1) another statutory provision expressly provides that the such provision supersedes sections 3345 and 3346;

(2) a statutory provision in effect on the date of enactment of the Federal Vacancies Reform Act of 1998 expressly—

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(3) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

(b) Any statutory provision providing general authority to the head of an Executive agency . . . to delegate duties to, or to reassign duties among, officers or employees of such Federal agency, is not a statutory provision to which subsection (a)(2) applies.[181]

There is no reasonable doubt that when this version was reported out of the Senate Committee, the Committee agreed as to what the provisions meant, what they did not mean, as well as what they did not cover:

181. S. REP. NO. 105-250, at 26 (1998).

- The described statutes were:
  - ✓ "retained,"
  - ✓ "preserved,"
  - ✓ "grandfathered," and
  - ✓ "exempted."
- The described statutes could *not* be:
  - ⌦ "overridden," nor
  - ⌦ "supplanted."

- FVRA covered all advice and consent positions in agencies "except those that are covered by express specific statute."[182]

- And the described statutes were "'retained' '*in lieu of*' the procedures contained in the Federal Vacancies Reform Act."[183]

But even without all of that clear legislative understanding and context, consider again the text of the reported and voted-on bill, shortened for relevance:

- "[FVRA is] applicable to any office . . . unless— . . . a statutory provision . . . designates an officer . . . ."[184]

3. Removing the Explicit § 508 Exemption from FVRA

The explicit textual exemption for the office of Attorney General, which was in the Vacancies Act since 1873, was always meant to be, and indeed was, continued in FVRA. In the first version of a new vacancies act bill, S. 1764, Senator Thurmond kept the same exemption, explicitly stating § 508 "shall be applicable."[185] Senator Byrd's S. 1761 also kept the exemption.[186] So it was no surprise that,

182. 144 CONG. REC. S11,022–23 (daily ed. Sept. 28, 1998), https://www.congress.gov/crec/1998/09/28/CREC-1998-09-28-pt1-PgS11021.pdf [https://perma.cc/9PYL-EUCM].

183. 145 CONG. REC. S33 (daily ed. Jan. 6, 1999), https://www.congress.gov/crec/1999/01/06/CREC-1999-01-06-pt1-PgS33-3.pdf [https://perma.cc/3H63-S2DH].

184. S. REP. NO. 105-250, at 26.

185. S. 1764, 105th Cong. § 3 (1998) (as introduced in the Senate on Mar. 16, 1998), https://www.congress.gov/105/bills/s1764/BILLS-105s1764is.pdf [https://perma.cc/E2MH-8YE3] ("With respect to the office of the Attorney General of the United States, the provisions of section 508 of title 28 shall be applicable.").

186. S. 1761, 105th Cong. § 3 (1998), https://www.congress.gov/105/bills/s1761/BILLS-

in April 1998, the first staff draft of Senator Thompson's S. 2176 also retained the explicit exemption.[187] It even remained after revisions were made to incorporate the June 5 agreement to retain prior specific statutes, and it remained in the first formally introduced version of S. 2176 on June 16.[188]

When the GAC Democratic staff noticed that the phrasing of the provision that implemented their June 5 agreement was not comprehensive enough to cover what was intended, they only had a day or two to act. Substantive amendments were due by June 16, and a vote to advance the bill out of committee was scheduled for the next day, June 17.[189] As a result, efforts were focused on fixing the language of the grandfathering section to better align with the agreement.[190] Those efforts resulted in Senator Lieberman's amendment, which later became § 3347(a)(1)(B). Other, more technical, fixes would be put off until later. And so, the explicit § 508 exemption again remained in the bill when it was reported out of committee to the Senate.[191]

However, the fact that the explicit exemption remained in the bill when the grandfathering provisions were added does not signify anything. It remained in the bill because it was thought to be a minor issue and a technical fix that could be attended to later, especially since there was not enough time to deal with all of the identified minor issues in one day. This is evidenced by a June 16 memo sent by Democratic GAC counsel to the GAC Chief Counsel one day before the bill was voted out of committee.[192] Among the list of items that were to be addressed in the future—entitled "other issues"—there was one especially relevant recommendation:

105s1761is.pdf [https://perma.cc/J2J2-C7FK] (as introduced in the Senate on Mar. 16, 1998) (this bill would have left § 3345 and the then-existing exemption unaffected, thereby keeping it in force).

187. Memorandum from Fred Ansell to Senator Fred Thompson, *supra* note 113.

188. S. 2176, 105th Cong. § 2 (1998), https://www.congress.gov/105/bills/s2176/BILLS-105s2176is.pdf [https://perma.cc/DNA2-7RWE] (as introduced in the Senate on June 16, 1998) ("With respect to the office of the Attorney General of the United States, the provisions of section 508 of title 28 shall be applicable.").

189. Memorandum from Laurie Rubenstein to Senator Lieberman, *supra* note 163.

190. *Id.*

191. S. REP. NO. 105-250, at 25 (1998).

192. Memorandum from Governmental Affairs Comm. Minority Staff to Fred Ansell (June 16, 1998) [App. at A-80].

- "Delete 3345(c) [the § 508 exemption] because it is included in 3347(a)(2)."[193]

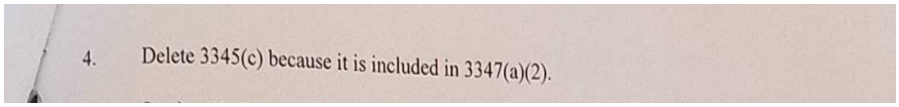
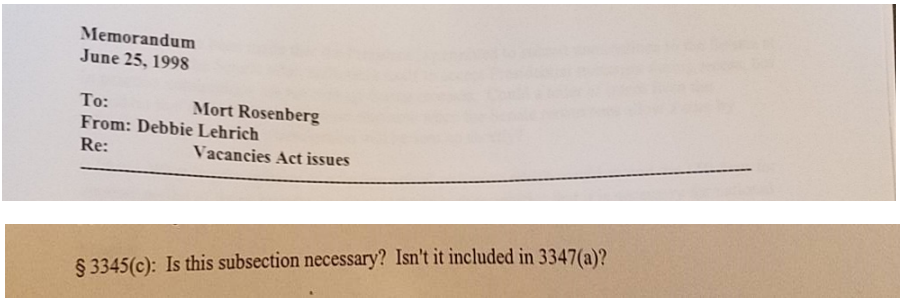

4. Delete 3345(c) because it is included in 3347(a)(2).

Figure 13: Key excerpt of a June 16, 1998 memo sent by Democratic GAC staff to GAC Chief Counsel Fred Ansell [App. at A-80–A-81].

A different Democratic counsel on GAC ensured that this understanding was accurate in a memorandum to CRS specialist Mort Rosenberg[194] on June 25:

- "§ 3345(c): Is this subsection necessary? Isn't it included in 3347(a)?"[195]


Memorandum
June 25, 1998

To: Mort Rosenberg
From: Debbie Lehrich
Re: Vacancies Act issues

§ 3345(c): Is this subsection necessary? Isn't it included in 3347(a)?

Figure 14: Key excerpt of a June 25, 1998 memo from Democratic GAC counsel Debbie Lehrich to CRS researcher Mort Rosenberg (the excerpts are from the same page, but lighting differed at the bottom of the page) [App. at A-82].

193. *Id.* (listing technical fixes, amendments, and "other issues").

194. Mr. Rosenberg's influence was often noted by the Supreme Court, and his writings were cited with approval and for historical accuracy in *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935–36 (2017) (Roberts, C.J.).

195. Memorandum from Debbie Lehrich to Mort Rosenberg (June 25, 1998) [App. at A-82] ("As we discussed a series of open issues—both drafting and substantive—for your review follows. . . . § 3345(c): Is this subsection necessary? Isn't it included in 3347(a)?"). Ms. Lehrich took over Mr. Plocher's responsibilities as he was departing to a new job.

It is known that this decision to remove § 508 was viewed only as a technical fix because future memos would so indicate, including one on July 14 that referenced an agreement to make changes in a future Managers' Amendment.[196] The "Additional Views" section of the Senate Report, submitted by Democratic senators, also referenced this agreement.[197] In that section, there was reference to "several *other issues* of concern to us which we believe are of a technical nature," but which staffs from all sides agreed "to aim to address these issues in a Managers' Amendment as the bill is considered by the full Senate."[198] And as just detailed above, the June 16 memo, which was sent to the GAC Chief Counsel, listed removing the § 508 exemption as one of several points under a heading titled "Other issues."[199]

As expected, and as that expectation was memorialized in the Senate Report, senators and staff from both parties worked together on a Managers' Amendment to FVRA. That Amendment was submitted by Senator Thompson on September 25, 1998, and it included a provision that removed the redundant exemption for § 508.[200]

Tellingly, a September 24 memo from the GAC Chief Counsel to Senator Thompson listed several larger issues to be addressed in that very Managers' Amendment—including changing certain phrasing in § 3347—but it did *not* mention the removal of the § 508 exemption.[201] And because the memo stated it "summarized the proposed managers'

196. *See* E-mail from Debbie Lehrich to Democratic Staff (July 14, 1998) [App. at A-87] ("Attached are additional views to the vacancies act of senator glenn and any of your bosses who are interested. This new draft reflects a conversation with Fred Ansell in which he agreed to address the following issues in a Managers' Amendment (see second to last paragraph of views)."). Indeed, the Senate Report's Additional Views would confirm that identified technical changes would be addressed "in a Managers' Amendment as the bill is considered by the full Senate." S. REP. NO. 105-250, at 32–33.

197. Memorandum on Additional Views of Senator Glenn to the Committee Report on S. 2176 (1998) [App. at A-84].

198. S. REP. NO. 105-250, at 32–33 (emphasis added to "other issues" to highlight that the removal of the redundant § 508 exemption was listed in a June 16 memo described above under the same heading "other issues").

199. Memorandum from Governmental Affairs Comm. Minority Staff to Fred Ansell, *supra* note 192 [App. at A-80].

200. 144 CONG. REC. S10,996 (daily ed. Sept. 25, 1998), https://www.congress.gov/crec/1998/09/25/CREC-1998-09-25-pt1-PgS10986-4.pdf [https://perma.cc/26TL-B4J8] (Thompson Amendment No. 3653 to S.2176).

201. Memorandum from Fred Ansell, Chief Counsel of the Senate Comm. on Governmental Affairs, to Senator Fred Thompson, Comm. Chairman on Vacancies Act (Sept. 24, 1998) [App. at A-92].

amendment . . . other than the very technical changes," it logically and contextually stands that the removal of the § 508 exemption was seen as a *non-substantive and only technical change*.

Even in a September 28, 1998 memorandum from the Senate Republican Policy Committee to all Republican Senators, the bill was described as follows:

> S. 2176 also preserves a number of existing statutes that provide a process by which persons can serve as acting officers when particular offices are vacant. In most instances, these officials can serve until a successor is confirmed, without regard to the Vacancies Act. . . . Possible Amendments: Manager's amendment. Making technical corrections.[202]

Of course, at that time, the items in the Managers' Amendment were known, agreed to, and already offered, but no description of either "exclusive" or the removal of the § 508 explicit exemption was discussed, other than "technical corrections."[203] Senator Thompson's October floor statements, which were meant to be a sort of managers' report,[204] echoed the exact same sentiment: "All other changes are intended to be purely technical."[205]

Accordingly, it is clear that although the Senators and staff knew about the explicit exemption for § 508, even when voting on the bill out of committee, and knew that it was likely to be removed, none thought it any kind of a substantial change. Nor did any Senators or

---

202. U.S. Senate Republican Policy Comm., *S.2176 – The Federal Vacancies Reform Act of 1998*, 1998 LEGIS. NOTICE NO. 97, at 4–5 (Sept. 28, 1998) [App. at A-108, A-111].

203. *See supra* notes 200–201.

204. 144 CONG. REC. S12,823 (daily ed. Oct. 21, 1998), https://www.congress.gov/crec/1998/10/21/CREC-1998-10-21-senate.pdf [https://perma.cc/PZ8X-FD5P] ("I wish to address the changes that have been made to S. 2176 since it was reported out of the Governmental Affairs Committee. The legislative history of the bill is largely described in the Committee report, S. Rep. 105–250. However, this is the opportunity to discuss the subsequent changes made in the bill."). Because these statements served as a kind of conference or managers' report, they should not be treated as ordinary colloquies or floor speeches. Rather, the statements should hold more weight than even the Senate Report, which only dealt with a previous and subsequently altered version of the bill.

205. *Id.* (Sen. Fred Thompson not addressing the removal of the § 508 exemption and stating, "All other changes are intended to be purely technical.").

staff evidently think it would even be worth a mention or hint of discussion.

In other words, the omission of the § 508 exemption was non-controversial and non-substantive because everyone thought the grandfathering categories would continue the exemption and accomplish the same thing, making it redundant. The same was true after the Managers' Amendment was submitted to the whole Senate, with not even a hint of discussion or concern; the change was non-substantive and purely technical. The existing understanding that only § 508 controlled who was authorized to be an Acting Attorney General was therefore continued by FVRA.

Not noticing or researching these histories, OLC's key argument—that the removal of the § 508 exemption from the FVRA bill and from the prior codified Vacancies Act signals support for its reading—could not be further from the truth. In fact, that it was removed as redundant helps confirm the very opposite of its argument. The § 508 exemption was only removed because § 3347(a)(1)(B) was meant to accomplish the exact same thing: have all categorically described statutes remain controlling by their own terms.

4. FVRA and § 3347's Structure

Another key OLC argument is that § 508 was not intended to be exempted from FVRA's reach because a different section, § 3349c, lists certain offices as excluded from FVRA, and the office of Attorney General is not among them.[206] In other words, because OLC believes that § 3349c was the only proper place in the statute for excluded offices, the fact that it did not list the office of Attorney General shows that Congress did not mean for it to be excluded. Without even incorporating the dispositive histories above, this particular argument can be quickly dismissed.

206. Designating an Acting Attorney Gen., 42 Op. O.L.C., slip op. at 4 (Nov. 14, 2018), https://www.justice.gov/olc/file/1112251/download [https://perma.cc/BKP5-ASGY]. This same argument was used in the 2007 opinion but was given more prominence in the 2018 Opinion; *see also* Authority of the President to Name an Acting Attorney Gen., 31 Op. O.L.C. 208 (2007).

Before beginning it must be noted that OLC's argument chases ghosts. It asks others to disprove why something was not written in the way OLC would have preferred it had been. Endless similar arguments could be volleyed back at OLC for why its reading is not supported with text that says the President may choose from either law, as well as many others. Still, for the sake of thoroughness, OLC's argument is analyzed.

First, some technical observations. OLC's "structural" argument ignores that § 3349c was meant to only cover multi-member commissions or other similar entities. There is not a single exclusion listed in that section that covers only one office—all examples have multiple members.[207] It seems OLC may simply not have looked at the explanation for this section in the Senate Report, which stated § 3349c aimed to keep such multi-member entities exempt and only included this section to "avoid any confusion."[208] The entities that are separately listed after § 3349c(1) were added because they were anomalous as "multi-member independent agenc[ies] that Congress has not placed in an independent establishment but in a department."[209] At the time of the Senate Report, only the Federal Energy Regulatory Commission was found as one such anomaly.[210] Later another was discovered and added: the Surface Transportation Board, which moved from the dissolved Interstate Commerce Commission to the Department of Transportation in 1996.[211]

Plus, § 3349c was not the only place where certain offices were excluded. It is indisputable that other sections, namely §§ 3347(a) and 3349b, excluded the GAO and holdover provisions. And we already know that the holdover provision in § 3349b was consistently described in the same way as provisions in § 3347(a): "retained."[212]

---

207. 5 U.S.C. § 3349c (2018).

208. S. REP. NO. 105-250, at 22 (1998).

209. *Id.*

210. *Id.*

211. *About STB*, SURFACE TRANSP. BOARD, https://www. https://prod.stb.gov/about-stb/ (last visited Jan. 15, 2020).

212. This section might, however, give other indications as to 5 U.S.C. § 3347(a). When described, this 3349c, written as "excluded," was often grouped with the description of § 3447. *See* 144 CONG. REC. S11,022–23 (daily ed. Sept. 28, 1998), https://www.congress.gov/crec/1998/09/28/CREC-1998-09-28-pt1-PgS11021.pdf [https://perma.cc/9PYL-EUCM] (statement of Sen. Fred Thompson) (stating, directly

Next, understand that many multi-member entities did not have specific succession statutes, and when they did, they often only dealt with leadership of that entity, not appointment to it. Thus, for many of these entities, listing them in § 3347—where only existing succession statutes were exempted—would have still subjected them to FVRA's appointment process to fill vacancies. In other words, it would have been pointless to exempt entities in § 3347(a)(1) that did not qualify under its terms. Also, moving the categorical exemptions from § 3347 to § 3349c would have been technically difficult, because the housekeeping statutes prohibition in § 3347(b) would also had to have been transferred, making the section longer and more awkwardly phrased. The entities listed and described in § 3349c generally do not have housekeeping statutes.

Perhaps most importantly, OLC's argument would make significant parts of FVRA a nullity. Section 3349c says nearly all of FVRA would not apply to listed offices. Had the categories in § 3347(a)(1) been moved to § 3349c, the enforcement provisions of § 3348, such as precluding later use of ratification and making violative actions have no force or effect, would not have applied to those described offices in cases of illegal appointment. In addition, those categories would still have been in danger of being sidestepped because FVRA's prohibition on the use of housekeeping statutes would not have applied to any offices in those categories. In other words, placing the § 3347(a)(1) categories in § 3349c would have empowered the same problem FVRA primarily aimed to stop, the use of housekeeping statutes, and it would have eliminated any consequence for doing so.

OLC did, however, have one valid point on this subject: the structure of the statute can be used to indicate certain concepts and intent.[213] OLC, in needing to find some loose justification for its view,

---

after saying the "Vacancies Act [would] cover all advice and consent positions in the executive Agencies *except* those covered by *express specific statutes*," that "[t]he bill *also exempts* multimember commissions, and it retains holdover provisions of current law"; thereby grouping the provisions in §§ 3347, 3349b, and 3349c as similar, and stating that § 3349b (the kind of statutes that "shall not be construed to [be] affect[ed] [by FVRA]") are "retained"—the same phrase used numerous times to describe the § 3347(a) statutes at issue here (emphases added)).

213. *E.g.*, Nat. Res. Def. Council v. Browner, 57 F.3d 1122, 1127 (D.C. Cir. 1995) ("Reference to statutory design and pertinent legislative history may often shed new light on congressional intent,

picked the only potential structural argument that it thought might help. One can wonder whether OLC considered the structural argument that clearly hurt its position: the structure of § 3347.

An examination of the categorical exemptions included in either the enacted § 3347 or its draft versions shows that every category within that section was always understood to be superseding. Consider the changes § 3347 underwent from final draft bill to the enacted FVRA law. The key words from the draft bill that were omitted are presented in strikethrough; additions made to the enacted FVRA are in italics; and unstyled times new roman font indicates no change.

> Sections 3345 and 3346 ~~are applicable to any office of an Executive agency . . .~~ *are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . , unless—*
>
> ~~(1) another statutory provision expressly provides that the such [sic] provision supersedes sections 3345 and 3346 [or] . . .~~
>
> ~~(2)~~ *(1)* a statutory provision ~~in effect on the date of enactment of the Federal Vacancies Reform Act of 1998~~ expressly—
>
> (A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
>
> (B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
>
> ~~(3)~~ *(2)* the President makes an appointment to fill a vacancy in such office during the recess of the

notwithstanding statutory language that appears superficially clear.").

> Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.[214]

The change that removed the first stricken paragraph ~~(1)~~ concerned only whether FVRA would make all future laws state whether they are intended to comply with or override FVRA.[215] But by having that stricken provision and its "supersedes" language grouped with the two provisions that remained—not to mention the recess appointment provision, which would objectively supersede FVRA if used—it seems apparent that the subsection was structured to have all of its elements supersede FVRA. No one would reasonably argue that recess appointments or future-enacted statutes with express superseding language would allow FVRA to somehow be used as alternatives to those statutes or the Constitution. Yet OLC argues that one of these provisions is different—the category that includes § 508—but never explains why.

Other structural clues can be seen as well. Consider what the bill did temporally. In an attempt to ensure the bill was exclusive, the draft bill captured "any office" and then created exemptions for future and past laws. Future laws would have to expressly state that they supersede the bill. But because the same express statement requirement could not be required of prior laws, the bill could only describe automatic-designation statutes when looking backwards. After all, it would be strange to allow future laws to supersede FVRA but not allow *any* past laws to do the same—especially in the same "unless" subsection.[216]

---

214. *Compare* S. 2176, 105th Cong. (1998), *as reprinted in* S. REP. NO. 105-250 at 26 (1998), *with* 5 U.S.C. § 3347 (2018).

215. It should be noted that such a provision would have been suspect on the basis that "one legislature cannot abridge the powers of a succeeding legislature." *E.g.*, Fletcher v. Peck, 10 U.S. 87, 135 (1810). A requirement to have Congress insert such a provision in future laws relating to FVRA could have been seen as similarly abridging.

216. *Cf.* Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 138 S. Ct. 1061, 1070 (2018) ("Thousands of statutory provisions use the phrase 'except as provided in . . . ' followed by a cross-reference in order to indicate that one rule should prevail over another in any circumstance in which the two conflict."). If the statutes were truly meant to coexist as OLC claims, then why even have this provision? Would it not have made more sense and have been far simpler to write a provision that stated no prior designation statutes are repealed? The very structure of this provision shows that a specific grandfathering was intended to occur.

This structure squares with the legislative intent and histories described above. Still, OLC and other proponents either ignored or did not examine this objective structure and instead zoomed in on only one word they suddenly enchanted and empowered: "exclusive." But, as will be shown next, Congress did not intend for the word "exclusive" to mean anything different than "applicable to any," nor did that word change how "exclusive" any Vacancies Act has always been—and it certainly did not create a new power to override other required laws.

5. "Applicable to Any Office" vs. "Exclusive"

Knowing that no text of FVRA says that it could function as an alternative to retained and required statutes, OLC falls back to a loose textual inference to save its position. OLC attempts to empower the word "exclusive" with authorities to reach other statutes outside of FVRA. But at the same time, OLC ignores the term "designates" and its implications altogether. Under OLC's reading, "exclusive" allows FVRA to be used as a discretionary alternative to the designating statutes FVRA grandfathered, and it effectively overrides their mandatory terms.

It is true that § 3347 underwent a rewording between its final bill form and enactment, changing "are applicable to any office . . . unless" to "are the exclusive means . . . unless." But it is not true that the change was intended to mean anything different. It was simply what Senator Byrd all throughout the legislative process called "a tightening of language" to ensure that DOJ could not continue using housekeeping statutes like §§ 509 and 510 to appoint acting officers.[217] It did not have any effect on § 508 or other exempted (1)(B)-type statutes. On that point, the legislative history is again clear.

Even before FVRA, all versions of the Vacancies Act were always thought to be the sole or "exclusive" means for filling vacancies—and their text even stated as much. The first modern Vacancies Act in 1868

217. *E.g.*, *Hearings*, *supra* note 74, at 18 ("Senator Glenn: Thank you, Mr. Chairman. Under your legislation, as I understand it, we would have to have an express exemption in another statute in order for any position to fall outside the Vacancies Act, is that correct? Senator Byrd: That is correct. And I hope we will make it so tight, so air-tight, so water-tight that no department can find a crack or a crevice anywhere through which to creep [Laughter]."); S. REP. NO. 105-250, at 9 (similarly stating).

had a clause that used different wording to say it was exclusive: "no appointment . . . otherwise than as is herein provided . . . shall be made . . . ."[218] The 1873 codified version kept the same.[219] The 1966 codification into positive law also kept nearly the exact same language.[220] Even the 1988 Vacancies Act amendments, according to two Senate Reports, were intended to "make[] clear that the Vacancies Act is the exclusive authority of the temporary appointment."[221]

The issue over exclusivity of the Vacancies Act vis-à-vis housekeeping statutes was the single largest impetus for FVRA.[222] DOJ and others correctly believed that later-enacted and more specific statutes controlled.[223] But many in Congress, and also GAO, believed that argument to be foreclosed by 1988 amendments to a different part

218. Act of July 28, 1868, ch. 227, § 2, 15 Stat. 168, 168 ("And no appointment, designation, or assignment otherwise than as is herein provided, in the cases mentioned in the first, second, and third sections of this act, shall be made except to fill a vacancy happening during the recess of the Senate."); *see also, e.g.*, *Hearings*, *supra* note 74, at 3 ("[T]he legislative history of 1868 certainly indicated that the Framers seemed to think that the Vacancies Act was the exclusive means by which appointments were made.").

219. REV. STAT. § 181 (1873) ("No temporary appointment, designation . . . shall be made otherwise than as provided by those sections, except to fill a vacancy happening during a recess of the Senate.").

220. Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 426; 5 U.S.C. § 3349 (1966) (stating an appointment "may not be made otherwise than as provided by [the Act], except to fulfill a vacancy occurring during a recess of the Senate").

221. S. REP. NO. 105-250, at 4 (quoting a Senate Report addressing the 1988 changes and what would become the Vacancies Act (S. REP. NO. 100-317, at 14 (1988)); *see also Hearings*, *supra* note 74, at 3 (opening statement of Chairman Thompson) ("So, in 1988, Congress passed an amendment to the Vacancies Act . . . . And, again, they stated that the Vacancies Act was supposed to be the exclusive means, unless there were some specific statutes specifically delineated that certain other people could be appointed otherwise.").

222. *E.g.*, Vacancies Act, 22 Op. O.L.C. 44, 47 (1998); S. REP. NO. 105-250, at 17; *Hearings*, *supra* note 74, at 62–63 (Jan. 14, 1998 memorandum from Morton Rosenberg, CRS, summarizing DOJ's position as: "[A] congressional waiver of the statutory restrictions on temporary designations. Thus, DOJ argues, where the organic act of a department or agency vests the powers and functions of the department in its head and authorizes that officer to delegate such powers and functions to subordinate officials or employees as she sees fit, such authority supersedes the general restrictions of law on temporarily filling advice and consent positions . . . ."); *see also id.* 116–17, 138–49 (positions of DOJ); OLC's position on the Vacancies Act and its statement before the Senate committee that led to the FVRA); *see supra* section II.B. (discussing the history of the Vacancies Act).

223. *E.g.*, Vacancies Act, 22 Op. O.L.C. at 47 (distinguishing between the "housekeeping" or "vesting and delegation statutes" like §§ 509 and 510 and "statutes that name particular positions"; also arguing that the "vesting and delegation" statutes were "enacted after the Vacancies Act [of 1868, which was simply reenacted over time] and supplement it, and § 3349 could not preclude later Congresses from granting this expanded authority."). "Vesting and delegation statutes" are defined as those that "vest[] an agency's powers in the agency head and allow[] delegation to subordinate officials . . . to assign, on an interim basis, the powers of certain vacant Senate-confirmed offices." *Id.* at 44. The term is used interchangeably with "housekeeping" statutes.

of the Vacancies Act, and by a clear legislative history indicating the act's "exclusivity" and superseding authority over unspecified appointment authorities—or "housekeeping statutes"—like §§ 509 and 510.[224] FVRA was determinatively written in such a way to affirm that position and foreclose DOJ's contrary take,[225] not to affect the statutes it grandfathered.

To accomplish that central goal, FVRA and its § 3347 utilized a legislative technique previously characterized as "catch-and-release." To ensure that FVRA would be considered first in controlling appointments, it was initially written to catch every vacancy by stating it was "applicable to any office." It would then "release" and keep certain provisions if they satisfied certain criteria that followed "unless. . ." And as an extra precaution to ensure that no housekeeping statutes like §§ 509 and 510 could survive, § 3347(b) foreclosed any errant interpretations by stating: "any statutory provision providing general authority to the head of an Executive agency is not a statutory provision to which subsection (a)(1) applies."[226]

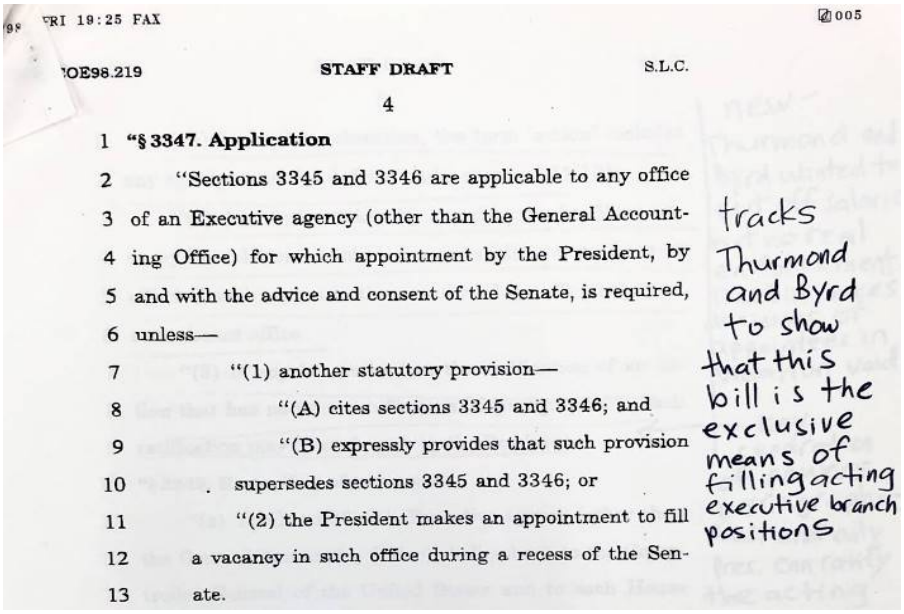
While the final and enacted version of FVRA uses the term "exclusive," there is strong and ample evidence that "applicable to

224. *See supra* notes 108–110, 217, 221.

225. 144 CONG. REC. S12,824 (daily ed. Oct. 21, 1998), https://www.congress.gov/crec/1998/10/21/CREC-1998-10-21-pt1-PgS12810-6.pdf [https://perma.cc/QHZ6-TQXE] (statement of Sen. Robert Byrd: "[A] a fair assessment of this entire issue to say that the matter of exclusivity is the bedrock point on which the executive and legislative branches have historically differed. . . . [I]n an effort to squarely address past problems, the Act specifically prohibits the use of general, 'housekeeping' statutes as a basis for circumventing the Vacancies Act. Provisions such as, but not limited to, 28 U.S.C. § 509 and § 510, which vest all functions of the Department of Justice in the Attorney General and allow the Attorney General to delegate responsibility for carrying out those functions, shall not be construed as providing an alternative means of filling vacancies."); *see also Hearings*, *supra* note 74, at 27, 29–30 ("[W]e [GAO] would suggest adding an amendment to explicitly provide that the Vacancies Act can be superseded only by another statute that provides an alternative means for filling a specific identified vacancy. . . . [A]mendment of the Act to clarify congressional intent could help ensure that the Act is followed . . . .").

226. *E.g.*, ROSENBERG, *supra* note 29, at 9 ("Section 3347(b) expressly negates the DOJ position that the statutory vesting of general agency authority in the head of any agency and allowing the agency head to delegate or reassign those vested duties and responsibilities to other agency officers or employees thereby provides an alternative to the Act's otherwise exclusive means of temporarily filling vacant positions."); *see also* 145 CONG. REC. S33 (daily ed. Jan. 6, 1999), https://www.congress.gov/crec/1999/01/06/CREC-1999-01-06-pt1-PgS33-3.pdf [https://perma.cc/3H63-S2DH] (statement of Sen. Fred Thompson) ("There is no question that the vesting and delegation statutes do not constitute provisions for the temporary appointment of specific officers, even without the cross-reference, which was designed to be even more emphatic.").

any," as was in the bill until late September 1998, was intended to mean exactly the same thing. At the outset, the very first draft of S. 2176 in April 1998 (which followed the March hearings on Senator Thurmond's S. 1764) used the language "applicable to any office . . . unless."[227] And in that staff draft for Senator Thompson, the drafters wrote margin notes indicating that § 3347 was always intended to be exclusive, even with the "applicable to any office language," stating: "tracks Thurmond and Byrd to show that this bill is the *exclusive* means of filling acting executive branch positions."[228]



98 FRI 19:25 FAX 005

OE98.219 STAFF DRAFT S.L.C.

4

"§ 3347. Application

"Sections 3345 and 3346 are applicable to any office of an Executive agency (other than the General Accounting Office) for which appointment by the President, by and with the advice and consent of the Senate, is required, unless—

"(1) another statutory provision—

"(A) cites sections 3345 and 3346; and

"(B) expressly provides that such provision supersedes sections 3345 and 3346; or

"(2) the President makes an appointment to fill a vacancy in such office during a recess of the Senate.

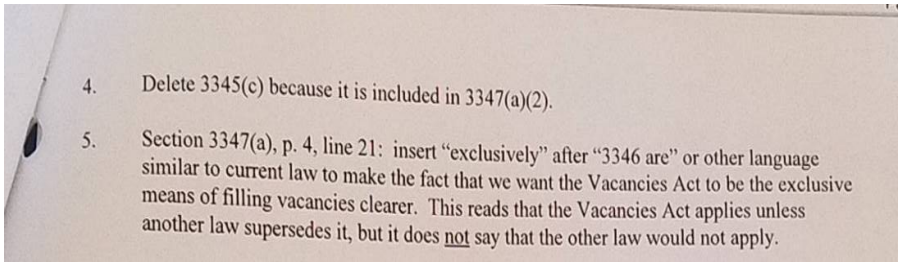
tracks Thurmond and Byrd to show that this bill is the exclusive means of filling acting executive branch positions

Figure 4 (from above): The first draft of S. 2176 and FVRA's § 3347 regarding exclusivity.

Even before the categorical exemption for succession statutes was added to the bill, concern about was raised whether the "applicable to" phrasing was strong enough to accomplish the main goal of the bill. Figure 15 below shows that as early as June 16, that language troubled

227. Memorandum from Fred Ansell to Senator Fred Thompson, *supra* note 113.
228. *Id.* (emphasis added).

some on the Democratic staff who worried it was not clear enough to override the housekeeping statutes that were its main target.[229] In other words, the worry was that DOJ might construe the whole section as permissive, thus negating the impetus for the entire bill.

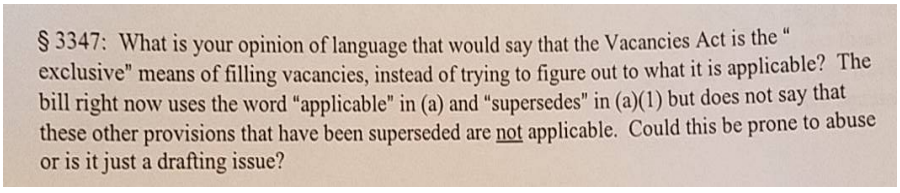


4. Delete 3345(c) because it is included in 3347(a)(2).

5. Section 3347(a), p. 4, line 21: insert "exclusively" after "3346 are" or other language similar to current law to make the fact that we want the Vacancies Act to be the exclusive means of filling vacancies clearer. This reads that the Vacancies Act applies unless another law supersedes it, but it does not say that the other law would not apply.

Figure 15: A larger excerpt from a June 16 memo reproduced above, in Figure 13 [App. at A-81–A-82].

A June 25 memo from GAC Democratic Counsel Debbie Lehrich to Morton Rosenberg of CRS recounted the same concern and asked for an opinion on how the section might be interpreted—specifically, whether the way it was written could still allow DOJ to read their housekeeping statutes as alternatives.[230]



§ 3347: What is your opinion of language that would say that the Vacancies Act is the " exclusive" means of filling vacancies, instead of trying to figure out to what it is applicable? The bill right now uses the word "applicable" in (a) and "supersedes" in (a)(1) but does not say that these other provisions that have been superseded are not applicable. Could this be prone to abuse or is it just a drafting issue?

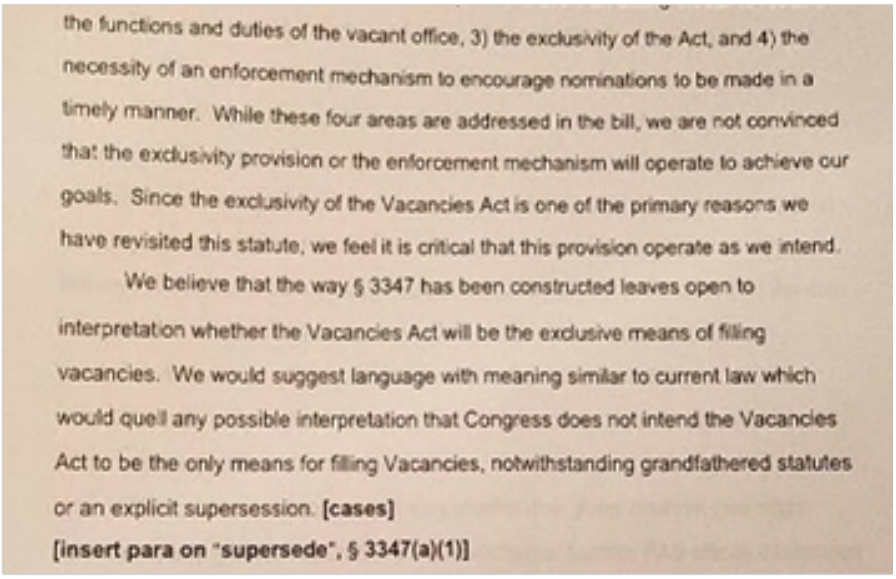
Figure 16: A different excerpt from a June 25 memo reproduced above, in Figure 14 [App. at A-83–A-84].

The possibility that DOJ might still read this section to allow housekeeping statutes was so concerning that in a first draft of the "Additional Views" section (a section included in the Senate Report

229. *Id.*; Memorandum from Governmental Affairs Comm. Minority Staff to Fred Ansell, *supra* note 192.

230. Memorandum from Debbie Lehrich to Morton Rosenberg, *supra* note 195.

and which several key senators signed on to), a separate paragraph detailed that worry about the bill's exclusivity.[231] The relevant excerpt from that draft is reproduced below, in Figure 17: "We would suggest language with meaning similar to current law, which would quell any possible interpretation that Congress does not intend the Vacancies Act to be the only means for filling Vacancies, notwithstanding grandfathered statutes or an explicit supersession."[232]



the functions and duties of the vacant office, 3) the exclusivity of the Act, and 4) the necessity of an enforcement mechanism to encourage nominations to be made in a timely manner. While these four areas are addressed in the bill, we are not convinced that the exclusivity provision or the enforcement mechanism will operate to achieve our goals. Since the exclusivity of the Vacancies Act is one of the primary reasons we have revisited this statute, we feel it is critical that this provision operate as we intend.

We believe that the way § 3347 has been constructed leaves open to interpretation whether the Vacancies Act will be the exclusive means of filling vacancies. We would suggest language with meaning similar to current law which would quell any possible interpretation that Congress does not intend the Vacancies Act to be the only means for filling Vacancies, notwithstanding grandfathered statutes or an explicit supersession. **[cases]**

[insert para on "supersede", § 3347(a)(1)]

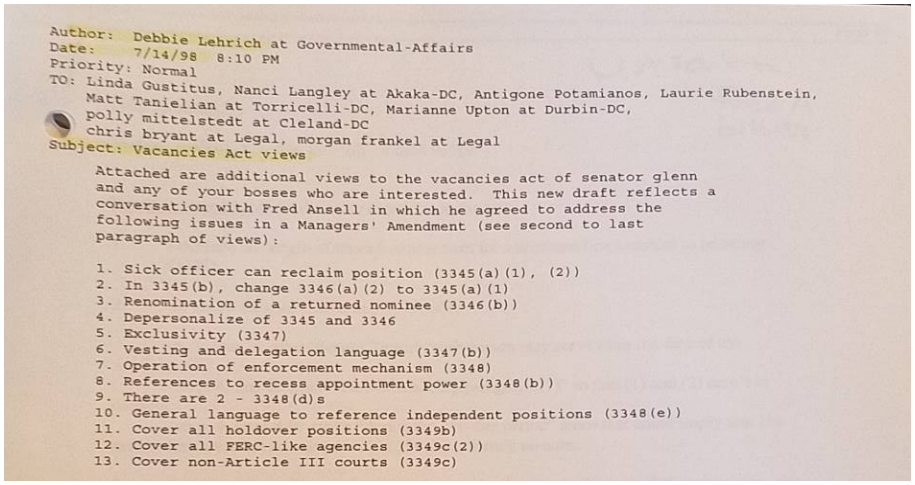
Figure 17: A draft of the "Additional Views" section of the Democratic Staff (undated, but before June 15, 1998) [App. at A-85–A-87].

But by July 14, 1998, another compromise had been reached, and senators and staff from both sides agreed that "applicable to any" would be changed to "exclusive" in a future "Managers' Amendment."[233] That agreement is reflected in a message reproduced in Figure 18, below.

231. Memorandum on Additional Views of Senator Glenn to the Committee Report on S. 2176, *supra* note 197.

232. *Id.*

233. E-mail from Debbie Lehrich to Democratic Staff, *supra* note 196.



Author: Debbie Lehrich at Governmental-Affairs
Date: 7/14/98 8:10 PM
Priority: Normal
TO: Linda Gustitus, Nanci Langley at Akaka-DC, Antigone Potamianos, Laurie Rubenstein, Matt Tanielian at Torricelli-DC, Marianne Upton at Durbin-DC, polly mittelstedt at Cleland-DC chris bryant at Legal, morgan frankel at Legal
Subject: Vacancies Act views

Attached are additional views to the vacancies act of senator glenn and any of your bosses who are interested. This new draft reflects a conversation with Fred Ansell in which he agreed to address the following issues in a Managers' Amendment (see second to last paragraph of views):

1. Sick officer can reclaim position (3345(a)(1), (2))
2. In 3345(b), change 3346(a)(2) to 3345(a)(1)
3. Renomination of a returned nominee (3346(b))
4. Depersonalize of 3345 and 3346
5. Exclusivity (3347)
6. Vesting and delegation language (3347(b))
7. Operation of enforcement mechanism (3348)
8. References to recess appointment power (3348(b))
9. There are 2 - 3348(d)s
10. General language to reference independent positions (3348(e))
11. Cover all holdover positions (3349b)
12. Cover all FERC-like agencies (3349c(2))
13. Cover non-Article III courts (3349c)

Figure 18: A July 14, 1998 email from Debbie Lehrich to Democratic staff explaining that the substitution of "exclusive" in lieu of "applicable to" was agreed upon shortly before the Senate Report was issued [App. at A-87].

Because an agreement had been reached, the above language regarding exclusivity in a draft "Additional Views" section was deleted. But in its place, in the final and published version of those same views in the Senate Report, the agreement was explicitly referenced:

> [T]here are several other issues of concern to us which we believe are of a technical nature. While they are important issues in that their resolution *affects the way a new law could be interpreted*, because *there is agreement* between Majority and Minority staffs to aim to address these issues in a Managers' Amendment as the bill is considered by the full Senate, such issues will not be enumerated here.[234]

234. S. REP. NO. 105-250, at 32–33 (1998) (emphases added).

Not only did that agreement cover exclusivity, but as recounted above, it also covered the removal of the redundant explicit exemption for the office of Attorney General.[235]

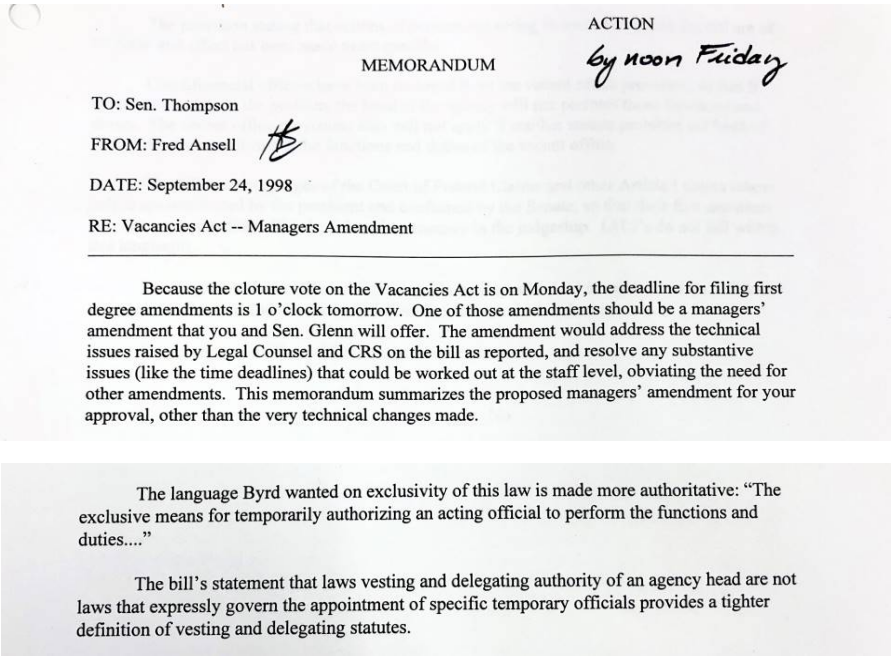
Tellingly, even though the majority and minority knew the language would be changed, they still characterized the version of the bill that had the "applicable to any . . . unless" language as "exclusive" several times in Senate Report.[236]

Finally, when it came time to introduce the Managers' Amendment on the floor, the GAC's Chief Counsel reminded Senator Thompson of the purpose and effect of the language change: "The language Byrd wanted on exclusivity of this law is made *more authoritative*: The exclusive means . . . ."[237]

235. *Id.*

236. *E.g.*, *id.* at 1, 8, 12 (describing the version of the bill that used the "applicable to any office" language and at least three separate times characterizing that bill as being "exclusive").

237. Memorandum from Fred Ansell, Chief Counsel of the Senate Comm. on Governmental Affairs, to Senator Fred Thompson, Comm. Chairman on Vacancies Act, *supra* note 201 (emphasis added). The manager's amendment was agreed to before Mr. Ansell's responses to the White House talking points made clear that the "bill would not affect . . . [and in fact] retains the operation of statutes Congress has passed that govern vacancies in particular positions . . . [such offices] will not be covered by this bill." *See supra* note 155.



ACTION

MEMORANDUM by noon Friday

TO: Sen. Thompson

FROM: Fred Ansell

DATE: September 24, 1998

RE: Vacancies Act -- Managers Amendment

Because the cloture vote on the Vacancies Act is on Monday, the deadline for filing first degree amendments is 1 o'clock tomorrow. One of those amendments should be a managers' amendment that you and Sen. Glenn will offer. The amendment would address the technical issues raised by Legal Counsel and CRS on the bill as reported, and resolve any substantive issues (like the time deadlines) that could be worked out at the staff level, obviating the need for other amendments. This memorandum summarizes the proposed managers' amendment for your approval, other than the very technical changes made.

The language Byrd wanted on exclusivity of this law is made more authoritative: "The exclusive means for temporarily authorizing an acting official to perform the functions and duties...."

The bill's statement that laws vesting and delegating authority of an agency head are not laws that expressly govern the appointment of specific temporary officials provides a tighter definition of vesting and delegating statutes.

Figure 19: Memo from GAC Chief Counsel Fred Ansell to Senator Thompson (Sept. 24, 1998) [App. at A-92].

Later, in the floor speeches that served as a kind of managers' report on FVRA, Senator Thompson characterized the substituted phrase "exclusive" as a stylistic change meant only to emphasize the same understanding: that it was the "sole means" for appointment.[238] Senator Byrd, in the same kind of floor statement, characterized the language change as "hopefully" ending the "decades-long disagreement" about the exclusivity of the Vacancies Act.[239]

238. 144 CONG. REC. S12,823 (daily ed. Oct. 21, 1998), https://www.congress.gov/crec/1998/10/21/CREC-1998-10-21-pt1-PgS12810-6.pdf [https://perma.cc/QHZ6-TQXE] (statement of Sen. Fred Thompson) ("The phrase 'applicable to' is replaced by 'the exclusive means for temporarily authorizing an acting official to perform the functions and duties of' in § 3347(a) to ensure that the Vacancies Act provides the sole means by which temporary officers may be appointed unless contrary statutory language as set forth by this legislation creates an explicit exception."); *id.* at S12,824 (statement of Sen. Robert Byrd) ("[T]he matter of exclusivity is the bedrock point on which the executive and legislative branches have historically differed. . . . Accordingly, it is my fervent hope that the language of the Act will, once and for all, end this decades-long disagreement.").

239. *Id.* at S12,824 (statement of Sen. Robert Byrd).

Critically, as shown, there is overwhelming evidence that the phrasing change from "applicable to any office . . . unless" to "exclusive . . . unless" was meant to function the same way—and to be even more "authoritative" to foreclose any unintended construction by DOJ. Additionally, because the senators and staffs pushing for the language change wanted the section to be exclusive, "notwithstanding grandfathered statutes"—and because those same senators and staffs exempted those same statutes just two weeks earlier—it cannot be implied that FVRA was ever meant to function as an alternative to those grandfathered statutes.

But in case this were not enough, Senator Byrd also said something quite telling in his floor statement to the Senate: if specific succession statutes "are enacted in the future," they would function the same way as similar "statutory provisions [that already] exist."[240] This supports the conclusion that all grandfathered statutes were intended to control, whether already passed into law or enacted in the future. This is especially so because Senator Byrd knew that he could not bind future Congresses, and he surely knew the well-settled canon and DOJ's position that a later-enacted and more specific provision controls. After all, that DOJ position was what caused him to work so hard to enact FVRA. Thus, if a future succession statute clearly controlled, and existing statutes were to function the same way, then existing statutes were intended to control as well. This again represents an overwhelming consistency as to how FVRA was explained and understood when enacted. And it again discredits OLC's position.

6. Problems with the Ambiguous Senate Report Quote

Apart from focusing on the term "exclusive," the other main point on which OLC hangs its hat is a single awkwardly written quote from the Senate Report on the draft bill:

> [E]ven with respect to the specific positions in which temporary officers may serve under the specific statutes this

240. *Id.*

> bill retains, the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office.[241]

OLC and other proponents seize on this "alternative procedure" quote as their only piece of legislative history to aver that either § 508 or FVRA may be used as alternatives to act in the office of Attorney General.[242]

But in relying so heavily on this quote, OLC overlooks the simple point that "alternative procedure" does not refer to using the procedures in FVRA to be the alternative; rather, it refers to the "alternative procedure" within the grandfathered statutes themselves: "with respect to the . . . statutes this bill retains."[243] In other words, the quote speaks of FVRA continuing to provide, in § 3347, alternative procedures *to* those in § 3345, i.e., different procedures.[244] This distinction is significant because the Vacancies Act was always thought to be superseded by those "alternative procedures," even though no text in the Act clearly stated so. All that this quote says is that the Vacancies Act would continue the alternative procedures found in the at least forty-some statutes that the bill retained.

Other sections of the Senate Report offer support for that reading. The awkward phrasing used in the quote directly aligns with March 1998 testimony on a similar bill, which was recounted on page 10 of the Report and used the same term: "GAO's recommendation [was] that legislation be passed to explicitly provide that the Vacancies Act can be superseded only by a statute providing an *alternative* means for

241. S. REP. NO. 105-250, at 17 (1998).

242. Relying on legislative history, but only on one non-contextual sentence of it, OLC has repeatedly stated: "'the Senate Committee Report accompanying the Act expressly disavows' the view that, where another statute is available, the Vacancies Reform Act may not be used." Designating an Acting Attorney Gen., 42 Op. O.L.C., slip op. at 6 (Nov. 14, 2018), https://www.justice.gov/olc/file/1112251/download [https://perma.cc/BKP5-ASGY] (quoting Authority of the President to Name an Acting Attorney Gen., 31 Op. O.L.C. 208 (2007), which, in turn, cited S. REP. NO. 105-250, at 17).

243. S. REP. NO. 105-250, at 17.

244. *See Alternative*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/alternative [https://perma.cc/XPT9-68F3] (last visited Jan. 17, 2019) (as a second definition, "different from the usual or conventional").

filling a particular vacancy."[245] Plus, two sentences before the quote at issue, the filling of vacancies according to office-specific statutes was referred to as "the existing procedure," and the Report questions if future committees should reexamine whether to "continue" it.[246] Furthermore, in the list of forty-some retained statutes just above that quote, when a statute had two different paths for appointment, they were characterized as "two alternatives."[247]

Regardless, the phrase "would *continue* to provide an alternative procedure" is key. Indeed, if the FVRA would have allowed itself to displace those "alternative" succession statutes, which even DOJ admitted were superseding, it would have marked the first time in over 125 years that would have been true. The only way it would have "continued" any understanding as to the Vacancies Act is if those retained statutes continued to be superseding—as DOJ, OLC, GAO, and even the Senate all agreed they were.[248] Such a reading also squares with the specific-over-general canon of statutory construction. In contrast, OLC's reading does not explain how to square that § 508 appeared twice in the Report's list of retained statutes, with then-§ 3345(c), which still stated that only § 508 and not FVRA would be applicable.[249] If § 508 was an alternative to FVRA in that version of the bill, how could a different section say it was superseding? The better reading, and one which does square two sections of that same bill, is that office-specific statutes like § 508 were meant to control.

Thus, this quote, upon which OLC so heavily relies, does *not* say that FVRA would offer an alternative to those statutes.[250] But it *does*

245. S. REP. NO. 105-250, at 10 (emphasis added); *see also Hearings*, *supra* note 74, at 29, 152 (oral and written testimony of GAO Associate General Counsel Joan M. Hollenbach, using the same "alternative" term).

246. *Id.* at 17, 20 ("[S]ection 3347 retains the existing statutory *procedure* for filling a vacancy in the general counsel of the NLRB." (emphasis added)).

247. *Id.* at 16.

248. *See* sources cited *supra* note 86.

249. S. REP. NO. 105-250, at 16, 25.

250. This construction is the mistake OLC made in 2007, when it construed the "alternative procedure" the wrong way, believing FVRA to be the alternative procedure, not the specific designation statute, as was the true case. Authority of the President to Name an Acting Attorney Gen., 31 Op. O.L.C. 208, 209 (2007) ("Furthermore, nothing in the text of the statute or its legislative history supports the conclusion that the *"alternative procedure" of the Vacancies Reform Act* may be used only when no one can serve under a statute like 28 U.S.C. § 508." (emphasis added)). OLC was wrong about not only to what the

say that those grandfathered statutes would *continue* to provide an *alternative procedure* to FVRA, just as they had always done to the Vacancies Act.

Think of the schema in this way. FVRA was meant to foreclose the use of housekeeping statutes, so it was written to be the statute where one would always start. One would then use § 3345(a), unless a recess appointment or office-specific statute applied in § 3347(a), in which case that section would control. In that way, FVRA continued to allow for those alternative procedures to its otherwise usual ones. The office-specific statutes referenced in § 3347, the alternative procedures, could not have been placed in § 3349(c) and excluded because otherwise the enforcement mechanisms in § 3348 would not apply to those office-specific statutes, as they were intended to.

In any event, and even if the quote in the Senate Report somehow means what OLC so heavily relies on it to mean, opposite *all* other indications in legislative history, including those after the Senate Report was published, it is at best ambiguous and therefore unreliable. But at worst for OLC, the "continuing" practice to which the quote refers flatly supports that the more specific "alternative procedures" remained controlling—as they had been for over a century. Otherwise, to credit OLC's position would mean that this one ambiguous and awkwardly worded quote, which would have affected at least thirty-five other offices and their twelve different Senate standing committees, was clear enough to the senators who advanced it. But the documents above confirm it was not. Moreover, at the time the Senate Report with this quote was issued, the "exclusive" phrasing had not been adopted and would not be for months to come. The senators in committee only voted on "applicable to any . . . unless."[251]

Consequently, it is extremely unlikely that such a colossal elephant of a change would have been introduced in such a buried mousehole of a few isolated words in a Senate report. If statutory repeals by implication are so disfavored, such a characterization of legislative

"alternative procedure" referred, but also about the lack of legislative history supporting a contrary view.

251. S. REP. NO. 105-250, at 11, 26.

history by implication must be even more disfavored.[252] OLC's reliance is misplaced. At best, this quote is ambiguous; otherwise, it can be found to support a position contrary to OLC's.

7. The Specific Cross-Reference in § 508

The final arguments OLC makes to support its preferred reading come from a skewed reading of § 508(a) and ignores history. For ease of reference, § 508(a) is reproduced here once again.

> (a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.

First, OLC posits that § 508(a) "provides that the Deputy Attorney General 'may' serve as Acting Attorney General, not that he 'must,' underscoring that the Vacancies Reform Act remains an alternative means of appointment."[253] Of course, as already shown above, this OLC assertion is unequivocally false. The term 'may' was a stylistic rephrasing inserted in 1966 by codifiers, not Congress, in lieu of "shall have power to exercise."[254] The codifiers' 1966 rephrasing has no legal authority, and courts know to disregard it in favor of the law's true text. Moreover, in 1953, and in 1966, the Vacancies Act had an explicit

252. Of course, reliance on an unsupported committee report interpretation is usually dismissed, especially where it is unspecific, carries on the same interpretation and practice (*e.g.*, all Vacancy Acts were thought to be exclusive), and offered no hint of any change in a significant practice and understanding. *E.g.*, Pierce v. Underwood, 487 U.S. 552, 556–57 (1988) (Scalia, J.) ("If this language is to be controlling upon us, it must be either (1) an authoritative interpretation of what the [] statute meant, or (2) an authoritative expression of what [] Congress intended. It cannot, of course, be the former, since it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means. Nor can it reasonably be thought to be the latter—because it is not an explanation of any language that the [] Committee drafted.").

253. Designating an Acting Attorney Gen., 42 Op. O.L.C., slip op. at 6–7 (Nov. 14, 2018), https://www.justice.gov/olc/file/1112251/download [https://perma.cc/BKP5-ASGY]; *see also id.* at 7 n.4 ("[S]ection 508 expressly acknowledges that the Deputy Attorney General is the first assistant but will not necessarily serve in the case of a vacancy in the office of Attorney General.").

254. 28 U.S.C. § 508(a) (1977).

exemption: "This section does not apply to a vacancy in the office of Attorney General."[255] Clearly, the text unequivocally prohibited using the Vacancies Act as a method of appointment for the office of Attorney General. But this is not OLC's only inaccuracy.

In its second main point, OLC posits that § 508(a)'s specific cross-reference to 5 U.S.C. § 3345 (along with the "may" reference disposed of above) are "statutory cross-references [which] confirm that section 508 works in conjunction with, and does not displace, the Vacancies Reform Act."[256] But in doing so, OLC not only changes a prior DOJ position,[257] but it also ignores the intent of that provision, which aimed to empower the Deputy Attorney General to have general management authority over DOJ.[258] But apart from those histories and intent, OLC's point fails as a basic and well-settled matter of statutory interpretation that it ignored: the reference canon.

Supreme Court cases going as far back as 1838, and as recently as February 2019, make clear that a specifically cross-referenced provision is to be interpreted as it stood at the time the statute making the reference was enacted.[259] It does not matter if the referenced

255. 5 U.S.C. § 3347 (1966); *see also* 5 U.S.C. § 6 (1952) ("In any of the cases mentioned in sections 4 and 5 of this title except the death, resignation, absence, or sickness of the Attorney General, the President may, in his discretion, authorize and direct the head of any other department or any other officer in either department . . . .").

256. Designating an Acting Attorney Gen., 42 Op. O.L.C., slip op. at 7; Authority of the President to Name an Acting Attorney Gen., 31 Op. O.L.C. 208, 210 n.3 (2007) ("Section 508 itself may give some indication that it does not displace the Vacancies Reform Act whenever an official in the chain of succession under 28 U.S.C. § 508(a) remains at the Department. Section 508(a) provides that 'for the purpose of section 3345(a) of title 5 the Deputy Attorney General is the first assistant to the Attorney General.'").

257. United States v. Lucido, 373 F. Supp. 1142, 1150 (E.D. Mich. 1974) ("§ 508 specifies that the Deputy Attorney General is the first assistant for purposes of § 3345. The Government argues that only § 508 applies to the office of Attorney General."); *see also* Acting Officers, 6 Op. O.L.C. 119, 121 (1982).

258. *See supra* notes 52 and 55 and accompanying text.

259. Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 769 (2019) (Roberts, C.J.) ("[A] statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent amendments."); Hassett v. Welch, 303 U.S. 303, 314 (1938) ("A well-settled canon tends to support the position of respondents: Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. . . . Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications by the statute so taken unless it does so by express intent." (citation omitted)); *accord* NORMAN J. SINGER & SHAMBIE SINGER, 2B SUTHERLAND STATUTORY CONSTRUCTION § 51:7 (7th ed. 2019); *see also In re* Heath, 144 U.S. 92, 93–94 (1892); Kendall v. U.S. *ex rel.* Stokes, 37 U.S. 524, 625 (1838) ("It was not an uncommon course of legislation

provision, here § 3345, was amended later. Since § 508's cross-reference was specific and enacted in 1953, § 508 can only work with § 3345 as it stood in 1953.

Only when the cross-reference is general, for example to a statute as a whole, are later amendments incorporated.[260] So, as a hypothetical, if the cross-reference said something akin to "for the purposes of the Vacancies Act," that general cross-reference would allow for the dynamic reference to become attached to the current FVRA. But of course, § 508(a) does not say anything of the sort. Consequently, OLC's assumption is again incorrect.

That reference canon is only superseded when the "legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments within the statute."[261] Here, legislative intent clearly supports that no subsequent amendments were ever intended to be incorporated, especially because § 508 was identified as specifically retained and grandfathered.

Accordingly, the cross-reference in § 508 must be a static one, made to the Vacancies Act as it stood in 1953. It does not, as OLC claims, show an intent to make § 508 "work in conjunction with, and [] not displace, the Vacancies Reform Act [FVRA]." That much is clear

---

in the states, at an early day, to adopt, by reference. . . . And such adoption has always been considered as referring to the law existing at the time of adoption; and no subsequent legislation has ever been supposed to affect it.").

260. *E.g.*, Pearce v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor, 603 F.2d 763, 767 (9th Cir. 1979) (finding in both text and intent an example of a general cross-reference: "the provisions of the Act entitled "Longshoremen's and Harbor Workers' Compensation Act."); Jam v. Int'l Fin. Corp., 860 F.3d 703, 708–09 (D.C. Cir. 2017) (Silberman, J.), *rev'd and remanded*, 139 S. Ct. 759, *and vacated*, 760 F. App'x 11 (D.C. Cir. 2019) ("*Atkinson* itself correctly acknowledged that a "statute [that] refers to a subject generally adopts the law on the subject," including "all the amendments and modifications of the law subsequent to the time the reference statute was enacted." (quoting Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1340 (D.C. Cir. 1998))). Such a general cross-reference is sometimes called "dynamic," changing with later amendments, as opposed to "static," which in the case of specific cross-references does not change with later amendments.

261. *E.g.*, *Kendall*, 37 U.S. at 625; Jackson v. Culinary Sch. of Wash., 788 F. Supp. 1233, 1250 (D.D.C. 1992) (citing 2A SUTHERLAND STATUTORY CONSTRUCTION § 51:08 (4th ed. 1984)); *see also* Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Peabody Coal Co., 554 F.2d 310, 322 (7th Cir. 1977) ("When a statute adopts the general law on a given subject, the reference is construed to mean that the law is as it reads thereafter at any given time including amendments subsequent to the time of adoption. This is to be contrasted with adoption by reference of limited and particular provisions of another statute, in which case the reference does not include subsequent amendments." (quoting 2A SUTHERLAND STATUTORY CONSTRUCTION § 51:07 (4th ed. 1973))).

because the Vacancies Act in 1953: (1) did not authorize a third category of employees to act in a PAS office, as was the purported authority for Mr. Whitaker; and (2) explicitly forbade the President from displacing the first assistant for the office of the Attorney General. Furthermore, there was never any tie-in between § 508 and the Vacancies Act as a whole in 1953, and there still is no tie-in to the FVRA as a whole today.

OLC's invalid argument does however raise many other problems, both in light of the canon and apart from it. For over a half-century, from 1953 to the present, DOJ has taken the position that a Deputy Attorney General acting as Attorney General under § 508 has no time limit. But if one assumes, as OLC now claims, the Deputy Attorney General succession dynamically "works in conjunction" with the Vacancies Act because of the cross-reference inserted in 1953, it would not only mean that the Deputy could be displaced, but also that the time limits of the Vacancies Act would apply. But DOJ has never so held.[262] From well before 1953 to 1988, the time limit that attached to anyone under the Vacancies Act, even the first assistant, was thirty days.[263] Yet history has at least three examples where the Deputy acted for a period longer than thirty days between 1953 and 1988.[264] Clearly,

262. DOJ has never so held and no such argument by DOJ has been found before 1998. Relatedly, it should be noted that only once has a court construed the interplay of both § 3345 and § 508, albeit extremely awkwardly and unpersuasively—and without analysis under the reference canon. In *Lucido*, a court held that the initial authority for Deputy Attorney General Kleindienst to act as Attorney General was § 3345, and after 30 days the Vacancies Act authority expired and § 508 offered subsequent authority for the period starting on the 31st day. United States v. Lucido, 373 F. Supp. 1142, 1151 (E.D. Mich. 1974). Significantly, at that time, DOJ told the court there was no tie-in with the Vacancies Act and "argue[d] that only § 508 applies to the office of Attorney General." *Id.* Clearly, the DOJ has changed its position to suit the desired outcome of this President. The better reading was had by *Halmo*, where, according to OLC, the court reached the conclusion that if there is a general source of delegation authority and a specific one, the "special source of authority prevails." United States v. Halmo, 386 F. Supp. 593, 595 (E.D. Wis. 1974). *See* Memorandum from John Harmon, Assistant Attorney Gen., Office of Legal Counsel, to the Attorney Gen., *supra* note 107.

263. *See* 5 U.S.C. § 7 (1952) ("A vacancy . . . must not be temporarily filled under the provisions of sections 4–6 of this title for a longer period than thirty days."); 5 U.S.C. § 3348 (1966) (same language as § 7, but in the new code location); Filling the Vacancy Following the Death of the Sec'y of War, 1 Op. O.L.C. Supp. 32, 40 (Sept. 21, 1936) (recounting legislative history of the 1891 amendment to the Vacancies Act, where the Senate rejected the idea that someone might serve as the head of a department indefinitely); Vacancy in Office of Sec'y of State, 32 Op. Att'y Gen. 139, 141 (1920) (holding the Undersecretary of State was limited to 30 days under the Vacancies Act's first assistant provision); *see also* sources cited *supra* note 24.

264. United States v. Guzek, 527 F.2d 552, 560 n.10 (8th Cir. 1975) (noting and restating the

DOJ did not think that § 508 worked in conjunction with the Vacancies Act then, or those three separate instances would have been unlawful.

And because even now, the reference canon takes a snapshot and freezes the first assistant specific cross-reference in § 508(a) to the time limit in 1953, no Deputy Attorney General today could act in the office of Attorney General for longer than thirty days, if indeed the cross-reference incorporated more than just one provision. Thus, if OLC's "works-in-conjunction" assumption is correct, not only would those three historical instances have been illegal, but then-Deputy Attorney General William Barr's acting service for 103 days in 1991 would also have been illegal.[265]

Other anomalies would also follow. Under OLC's wishful reading, the Deputy Attorney General would be time-limited, but the next twelve successors[266] under § 508(b) would not have any time limits. Why would Congress make such an odd result?

For all of these reasons, OLC does not have a proper reading of either the cross-reference or its legal effect.

B. Canons of Construction: How to Read the Two Statutes Together

With OLC's statutory arguments dispelled, a proper statutory analysis can now be quickly introduced. To aid in that analysis, several primary canons of statutory construction are introduced below. Unsurprisingly, they will *all* point to a common-sense construction of the two statutes: only § 508 controls who is authorized to become the Acting Attorney General. The lessons taken from these analyses apply

government's brief, which stated, "There have been at least six (sic) instances since 1880 (three of them since 1964) during which the office of Attorney General has been temporarily filled for a period in excess of 30 days" and listing one as Deputy Attorney General Ramsey Clark who acted as Attorney General for 151 days in 1966); *see also* Acting Attorneys Gen., 8 Op. O.L.C. 39, 40 (1984) (listing Deputy Attorney General Richard G. Kleindienst as acting Attorney General for 103 days in 1972; and listing Deputy Attorney General Nicholas Katzenbach as acting Attorney General for 160 days beginning in 1964).

265. *E.g.*, David Johnston, *Barr Is Confirmed on Voice Vote as 77th Attorney General of U.S.*, N.Y. TIMES (Nov. 21, 1991), https://www.nytimes.com/1991/11/21/us/barr-is-confirmed-on-voice-vote-as-77th-attorney-general-of-us.html [https://perma.cc/GW74-MQXD].

266. *See supra* note 9.

to not only the Attorney General Succession Statute in § 508, but to any office-specific succession statute versus FVRA.

1. Is There an Ambiguity in FVRA?

The first question to ask in statutory construction is the most basic. Is there ambiguity in the statute so that a reasonable person might infer at least two different meanings? Here, the answer can only be yes.

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[267] The language used in FVRA clearly causes ambiguity. OLC's interpretation of the term "exclusive," while highly unlikely, is, at a first uninformed glance, objectively plausible—although still unclear. But after the histories and analyses presented herein, if it is not definitively clear that the designation statutes were exempted and control by their own terms, it is at the very least ambiguous.[268]

Moreover, that OLC already resorted to legislative history in an attempt to support its position suggests that even it recognized there was ambiguity. Any time a party has to claim it has the correct interpretation because nothing in the text of the statute clearly refutes its position, it should create pause: "the Vacancies Reform Act nowhere says that, if another statute remains in effect, the Vacancies Reform Act may not be used." [269] And finally, when even the White House Counsel took a position in 2001 that directly aligned with this

267. Validus Reinsurance, Ltd. v. United States, 786 F.3d 1039, 1043 (D.C. Cir. 2015) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)); *see also* Cook Inlet Tribal Council v. Mandregan, 348 F. Supp. 3d 1, 9 (D.D.C. 2018) ("Generally, a statute's text is only ambiguous if, after 'employing traditional tools of statutory construction,' a court determines that Congress did not have a precise intention on the question at issue.").

268. A point not mentioned above is that the term "designates" alone creates a facial ambiguity because it implies a requirement and means that certain statutes are "set apart for a specific purpose, office, or duty." *Designate*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/designate [https://perma.cc/D9MN-3AR8] (last visited Sept. 25, 2019) ("[T]o indicate and set apart for a specific purpose, office, or duty").

269. Designating an Acting Attorney Gen., 42 Op. O.L.C., slip op. at 6 (Nov. 14, 2018), https://www.justice.gov/olc/file/1112251/download [https://perma.cc/BKP5-ASGY]

Article's conclusions regarding § 508 and went against OLC's,[270] an inquiry beyond plain text is necessary.

Once an ambiguity is determined, a court must turn to other methods of statutory construction, to include "examin[ing] its legislative history, predecessor statutes, pertinent court decisions, and post-enactment administrative interpretations."[271] Such context and history has already been extensively recounted above, and it all points contrary to OLC's position and to § 508 as controlling. This alone should end the matter: if ambiguous, turn to legislative history to clarify. But for the sake of thoroughness, and to appease even the most exacting judge, other canons will be considered as if either an ambiguity did not exist or as if legislative history and context somehow did not resolve the issue.

2. Is There a Conflict Between § 508 and FVRA?

In its opinion on this issue, OLC goes into great depth on several topics; but conspicuously, it strains itself to avoid reading FVRA and § 508 as conflicting. The reason for such avoidance is fairly evident. If the two statutes conflict, then canons of statutory construction kick in to resolve the conflict. But instead of turning to these canons, which would invariably hurt their position, OLC makes an unusual assertion: that the President is able to pick and choose from the two statutes—that they coexist.[272] That is quite a unique position, especially when one

270. Authority of the President to Name an Acting Attorney Gen., 31 Op. O.L.C. 208, 210 (2007) (citing Memorandum from Alberto R. Gonzales, Counsel to the President, to the Heads of Fed. Exec. Dep'ts on Agency Reporting Requirements Under the Vacancies Reform Act 2 (Mar. 21, 2001), https://www.nrc.gov/docs/ML0108/ML010860191.pdf [https://perma.cc/3AQQ-2YY2]); *see also id.* ("Positions for which another statute designates who shall serve as an acting officer, or for which another statute specifically authorizes the President, a court, or the head of an executive department to designate an acting officer, are also exempt."); *id.* at 2 n.2 ("For example, because 28 U.S.C. § 508 governs who shall act as Attorney General in the case of a vacancy, the Vacancies Reform Act does not apply to the position of Attorney General unless there is no official serving in any of the positions designated by section 508 to act as attorney general in the case of a vacancy.").

271. *E.g.*, *In re* HP Inkjet Printer Litig., 716 F.3d 1173, 1180–81 (9th Cir. 2013) ("Where the statutory text is ambiguous, however, we may 'look to other interpretive tools, including the legislative history' in order to determine the statute's best meaning." (quoting Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 567 (2005))).

272. Designating an Acting Attorney Gen., 42 Op. O.L.C., slip op. at 7 ("508 works in conjunction with, and does not displace, the Vacancies Reform Act . . . the Vacancies Reform Act remains available, notwithstanding section 508.").

statute, § 508, is written in mandatory and automatic terms. Unfortunately for OLC, it is also untenable. There is simply no avoiding the conflict generated between the two statutes, as OLC interprets them. One, § 508, is specific and authorizes only the Deputy Attorney General to act as the head of DOJ. The other, FVRA, is general and was used to purportedly authorize a DOJ employee to skip over several designated PAS officers to lead the DOJ. Two different statutes, two different results, with two different people for one position. Under OLC's reading, a conflict could not be clearer. Consequently, if unambiguous, the statutes can only be reconciled using canons of statutory construction.

3. Did One Statute Repeal the Other, Explicitly or Implicitly?

An inquiry regarding repeals is simple. All sides agree that no explicit repeal occurred. And no direct implicit repeal could be argued because legislative history shows that § 508 was explicitly retained and grandfathered. But consider whether what OLC argues is still effectively an implicit repeal. If, as all sides agree, the FVRA retained § 508 and did not affect it, then something else must have happened to its superseding authority. Because no text in FVRA directly circumscribed it, it can only have been affected implicitly. Of course, "'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'"[273] Here, legislative intent is clear but points overwhelmingly in the opposite direction, against any kind of implicit repeal. Section 508 *continued* to remain unaffected and controlling.

4. Is One Statute More Specific than the Other?

One way of avoiding a conflict between statutes is to find that one has "a specific provision applying to a very specific situation."[274] A

273. Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 662 (2007); *see also* Morton v. Mancari, 417 U.S. 535, 549 (1974) (stating that "repeals by implication are not favored" and refusing to read "congressional silence as effectuating a repeal by implication," instead finding that legislative intent was "to the contrary" of any kind of repeal).

274. *Morton*, 417 U.S. at 550.

well-established canon of construction is that the specific always trumps the general,[275] even if the general statute is later-enacted.[276] Thus, any reliance on the fact that FVRA was enacted after § 508 is irrelevant. The later-enacted canon only applies to the same subject matter.[277] The fact that § 508 specifies succession for one office, whereas FVRA speaks in general terms, makes § 508 alone control.

5. Incoherent Results

If every court were swindled by OLC's suggestion that FVRA is somehow an alternative to § 508 and similar statutes, it would lead to incoherent and nonsensical results. Here are just a few consequences of allowing such an unsupported reading.

First, as was the case with Mr. Whitaker, an unconfirmed senior employee could supervise and have vast authority—even de facto removal powers—over officials confirmed by the Senate with the firm knowledge that they might lead the particular department.

Another incoherency arises when one considers military statutes—the very same statutes that Senators Byrd, Thompson, Glenn, Lieberman, Thurmond, and indeed all GAC Senators clearly intended to remain controlling.[278] Among the list of forty-some positions identified as retained in the Senate Report are several military senior commanders, including the Commandant of the Marine

275. Ginsburg, Feldman & Bress v. Fed. Energy Admin., 591 F.2d 717, 720 n.5 (D.C. Cir. 1978) ("Where statutes deal with a subject in both general and detailed terms, and there is conflict between the two, the detailed expression prevails.").

276. *E.g.*, Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."); *Morton*, 417 U.S. at 550–51 ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); Townsend v. Little, 109 U.S. 504, 512 (1883) ("According to the well-settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general.").

277. Posadas v. Nat'l City Bank of N.Y., 296 U.S. 497, 503 (1936) ("[I]f the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak . . . .").

278. *See Hearings*, *supra* note 74; ROSENBERG, *supra* note 29; Memorandum from Fred Ansell to Senator Fred Thompson, *supra* note 113; *Thompson Statement*, *supra* note 101.

Corps.[279] The applicable statute requires that the position be held by an active-duty Marine Corps officer.[280] It also requires that the Assistant Commandant have the grade of full four-star general, as the Commandant does. But the Assistant Commandant also "shall perform the duties of the Commandant" when there is a vacancy.[281] Under the reasoning of OLC and the alternative approach, any senior DoD civilian employee or any Senate-confirmed officer could be appointed thereto using FVRA. The same would be true of many other military positions.[282] Such results would be incoherent. They would also run afoul of other laws involving military officer commissions. Nevertheless, under the alternative reading of FVRA, that result would ensue.

6. The Constitutional Avoidance Canon

"Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter."[283] The canon of constitutional avoidance was originally based on probable meaning of the legislature and has since evolved to be justified as avoiding conflicts with the legislature.[284] In either case, the principles of legislative intent, the presumption against unconstitutionality, and the respect for the separation of powers all call for a reading of the FVRA that does not implicate grave constitutional concerns.

If OLC's reading were true, many constitutional questions and concerns would arise: How can an employee act as an officer, and a principal officer at that? How does FVRA make an employee an acting officer if FVRA does not confer an appointment and only authorizes one to perform the functions and duties of an office? How can an

279. S. REP. NO. 105-250, at 16 (1998) (listed sixteenth).
280. 10 U.S.C. § 5044(a) (2018).
281. *Id.* § 5044(d)(1).
282. *E.g.*, 10 U.S.C. § 154 (2018) (Chairman of the Joint Chiefs); 10 U.S.C. § 3034 (2018) (Army Chief of Staff); 10 U.S.C. § 5035(d)(2) (2018) (Chief of Naval Operations); 10 U.S.C. § 8034 (2018) (USAF Chief of Staff).
283. U.S. *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909).
284. ANTONIN SCALIA & BRYAN GARNER, READING LAW 248–49 (2012).

employee act as an officer if no commission is granted, especially in light of recess appointees being granted written commissions? Is FVRA's allowance for one to act in office longer than a recess appointment problematic? Are such designations under FVRA allowed if there is no exigency and if the Senate is in session? Could an employee who acts as a principal officer then appoint inferior officers if Congress vested such authority in the office at issue? And is FVRA the type of law, and specific enough, to satisfy Article II, Section Two's requirement that Congress "may by law vest the Appointment of such inferior officers as they think proper in the President alone"?

However, if § 508 alone controls—at least in this instance—real, grave, and first-impression constitutional questions and any unforeseen, wide-ranging implications therefrom can be avoided.

To preempt statutory and especially constitutional concerns, OLC set forth a lengthy argument in its opinion explaining why it is permissible for a President to use the FVRA to appoint Mr. Whitaker.[285] The constitutional analyses were in-depth and complex. Those other arguments are not judged here. But simply note the effort and length of OLC's arguments. In sharp contrast, neither the Senate nor Congress even considered the rather significant constitutional implications of FVRA. Those effects may have been more muted with respect to inferior officers, but if FVRA was truly thought capable of displacing each department's principal officer, one would hope that at least a single voice of caution would have murmured among 535 lawmakers. In other words, Congress's complete silence on FVRA's constitutionality speaks louder than OLC's extensive arguments. But if instead, the Senate and Congress thought the United States' most important principal officers had an established, distinct, and superseding order of succession, as ten of the then-fourteen Executive departments did,[286] it may have been more easily presumed that those

285. *See* Memorandum from Steven Engel, Assistant Attorney Gen., U.S. Dep't of Justice, to Emmet T. Flood, Counsel to the President (Nov. 14, 2018), https://www.courthousenews.com/wp-content/uploads/2018/11/WhitakerOLC.pdf [https://perma.cc/K4LB-Y3WE].

286. The Departments of State, Interior, Commerce, and Housing and Urban Development were the 4 out of 14 departments that did not have a specific succession statute. Although, at the time each had

statutes could not be displaced in favor of FVRA or that all departments had such statutes that would control.

7. Is a Harmonious Reading Possible to Give Effect to Both Statutes?

The best way to avoid an ambiguity, conflict, implicit repeal, incoherency, or constitutional questions in OLC's reading is simply to find a better way of reading the statutes, or to "give effect to both if possible."[287] Indeed, this is perhaps the most prime canon of construction:

> When confronted with two Acts of Congress allegedly touching on the same topic, [a] Court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both . . . . A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow. The intention must be 'clear and manifest.' And in approaching a claimed conflict, we come armed with the 'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute.[288]

Due consideration must be given to the reading that harmonizes both statutes and violates neither. As emphasized, statutes like § 508, apart from being more specific, are automatic and required. There is plainly no way to use FVRA and not violate § 508. However, § 508 can vest

---

Executive orders designating succession and which generally followed each department's rank structure. Today, there are 15 Executive departments with the addition of Homeland Security, which also has its own succession statute. 6 U.S.C. § 113(a)(1), (g) (2018).

287. Morton v. Mancari, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

288. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018).

and not violate FVRA. It is a simple "may" versus "shall." FVRA is by its own terms permissive; the President "*may* direct an officer or employee."[289] There is no requirement that a president does so. In sharp contrast, § 508 is required. There is no discretion afforded. The designee, here the Deputy Attorney General, "shall have power" to be Acting Attorney General, followed by other officials who "shall act." This aligns precisely with the use and understanding of these statutes before FVRA. It also squares precisely with the legislative intent of grandfathering and exempting them. Only when the required list of successors in § 508 are exhausted is there no conflict. At that point, and only then, the President can use FVRA to designate other officers in a further order of succession.

This simple and harmonious reading of FVRA and another statute makes practical sense too. Unlike a § 3347(a)(1)(B)-category statute—for instance § 508, which automatically vests power to act in another specified official, in effect immediately filling the vacancy—§ 3347(a)(1)(A)-category statutes remain open until someone is designated.[290] That is why § 3347(a)(1)(A) statutes still supersede FVRA initially and are looked to first; however, because of their permissive and discretionary nature (e.g., "may appoint"), they can be disregarded in favor of the FVRA—because the position would not have been filled and it is still practical and possible to choose either statutory mechanism.[291] But when § 508 automatically vests (e.g., "shall act"), the position is filled.[292] And the FVRA contains absolutely no authority beyond its own provisions to displace other appointments or statutes.

Accordingly, the same result is reached either through the overwhelming evidence in legislative history, through

289. 5 U.S.C. § 3345(a)(3) (2018).

290. *Id.* § 3347(a)(1); 28 U.S.C. § 508 (2018).

291. 5 U.S.C. § 3347(a)(1); 28 U.S.C. § 508.

292. This was true even in this instance. Attorney General Sessions "resigned" on November 7, 2018. But the President did not formally designate Mr. Whitaker until either November 8th or November 13th, when DOJ received the designation letter. *See* Memorandum from the President to Matthew Whitaker (Nov. 8, 2018), https://www.justsecurity.org/wp-content/uploads/2018/12/November-8-2018-Memo.pdf [https://perma.cc/U9G4-HQTK]. Consequently, depending on whether the President's Tweet provided adequate designation authority or whether the memo did so, the Deputy Attorney General might have technically, even if not functionally, been the acting head of DOJ for about a day.

well-established canons of construction, or through a basic harmonization that gives effect to both statutes. In each instance, the best reading of both statutes is that § 508 first escapes FVRA and then trumps it. Automatic and specific vesting statutes like § 508 that afford no discretion must be followed and FVRA cannot be used in their stead. This construction avoids serious constitutional questions raised by elevating an employee to become a principal officer. It gives deference to prior judgments of Congress as to which officer is best suited to lead a department. It avoids reading an implicit repeal of over 125 years of practice without any hint of discussion. It ensures practical continuity by someone confirmed by the Senate to be "well-qualified in law." It keeps DOJ policies from being suddenly changed by non-senior and temporary officials. It avoids favoritism and potential quid pro quos. It follows the clear legislative intent. And, most importantly, it follows the text of *both* laws.

C. Enforcement and FVRA's Non-Ratification Provision

A separate, but deeply intertwined topic in FVRA warrants attention before concluding: the enforcement mechanism in § 3348. This part of FVRA answers what happens when someone serves in a PAS position in violation of FVRA. And it too has been misconstrued by DOJ.

The issue is relevant to this debate because, to prevent the D.C. Circuit from reaching the merits of the FVRA versus § 508 question, the subsequent confirmed Attorney General ratified one of the only known formal actions made by Mr. Whitaker roughly a week before that court's oral argument.[293] Unfortunately, the last-minute ratification tactic meant not only that court did not consider the office-specific statute arguments presented here, but it also did not consider that FVRA itself precluded ratification of Mr. Whitaker's

293. Indeed, the Justice Department was concerned about litigation on the very issues raised here. As a result, and to impose a procedural block, William Barr, ratified an action taken by an Acting Attorney General. It is the first time in the history of DOJ the actions of an Acting Attorney General were formally ratified. Mr. Barr did so expressly because of "litigation in which parties have argued that Mr. Whitaker was not validly serving as the Acting Attorney General, as either a statutory or constitutional matter." Bump-Stock-Type Devices, 84 Fed. Reg. 9239 (Mar. 14, 2019).

rulemaking because the function was exclusively assigned to the Attorney General by statute.[294]

Briefly summarizing the anti-ratification provision, FVRA's § 3348(d) voids the actions of a person who is not properly acting under FVRA or under the office-specific succession statutes it retained in § 3347: "An action taken [not in accordance with] section 3345, 3346, or 3347 . . . in the performance of any function or duty of a vacant office . . . shall have no force or effect." And more importantly, "[a]n action that has no force or effect . . . may not be ratified."[295]

Ample evidence throughout legislative history confirms that § 3348 was written and enacted as direct response to a D.C. Circuit case, captioned *Doolin*,[296] to expressly overrule its holdings and to create an effective enforcement mechanism for non-compliance with FVRA.[297]

In *Doolin*, an appellate panel declined to reach the merits of whether an agency's acting director's service violated the Vacancies Act because a subsequent Senate-confirmed director ratified the action that was challenged.[298] Under long-standing circuit precedent on agency, an act of ratification effectively serves to "remedy the defect . . . from the initial appointment" and "does not implicate the exception to mootness for cases that are 'capable of repetition, yet evading

294. Guedes v. ATF, 920 F.3d 1, 7 (D.C. Cir. 2019) ("Congress expressly charged the Attorney General with the 'administration and enforcement' of the National Firearms Act, 26 U.S.C. § 7801(a)(1), (a)(2)(A), and provided that the Attorney General 'shall prescribe all needful rules and regulations for the enforcement of' the Act,[] *id*. § 7805; *see id*. § 7801(a)(2)(A)."); *see also infra* note 299.

295. 5 U.S.C. § 3348(d)(2).

296. Doolin Sec. Sav. Bank v. Office of Thrift Supervision, 139 F.3d 203 (D.C. Cir. 1998).

297. *E.g.*, SW Gen., Inc. v. NLRB, 796 F.3d 67, 71 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017) ("Moreover, in response to *Doolin*, the FVRA renders actions taken by persons serving in violation of the Act void *ab initio*."); *id.* ("FVRA 'impose[s] a sanction for noncompliance,' thereby '[o]verruling several portions of [*Doolin*]'" (quoting 144 CONG. REC. S6414 (daily ed. June 16, 1998), https://www.congress.gov/crec/1998/06/16/CREC-1998-06-16-pt1-PgS6405-3.pdf [https://perma.cc/FLS2-K2CU])); 144 CONG. REC. S6414 (statement of Sen. Fred Thompson) ("Overruling several portions of that [*Doolin*] decision have become a priority."); S. REP. NO. 105-250, at 5–7 (1998); *id.* at 11 ("To ensure an effective enforcement mechanism and to overturn the recent decision [in *Doolin*] . . . , the Committee believes that replacement of the existing Vacancies Act is necessary."); *id.* at 19–20 ("The Committee expects that litigants with standing to challenge purported agency actions taken in violation of these provisions will raise non-compliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action. It is concerned that the ratification approach taken by the court in *Doolin* would render enforcement of the Vacancies Reform Act a nullity in many instances.").

298. *Doolin*, 139 F.3d at 214.

review.'"[299] Thus, *Doolin* and other cases analyzing ratifications under the general laws of agency usually have not reached the merits of whether a person was illegally acting in office expressly because such actions are often ratified before judicial review.

But shortly after *Doolin*, the FVRA's authors recognized that "the ratification approach taken by the court in *Doolin* would render enforcement of the Vacancies Reform Act a nullity in many instances."[300] As said elsewhere in the Senate Report on FVRA, "if any subsequent acting official or anyone else can ratify the actions of a person who served beyond the length of time provided by the Vacancies Act, then no consequence will derive from an illegal acting designation."[301] Thus it is clear that § 3348 was written expressly to overturn *Doolin* and to ensure there would be consequences for illegally acting in office.[302]

But DOJ either misses or ignores all of that history and intent. Instead, DOJ suggests a construction of key parts of § 3348 that would make few, if any, officers and duties subject to any consequences of FVRA's enforcement mechanism.[303] What's more, DOJ's

299. *Guedes*, 920 F.3d at 13, 14, *judgment entered*, 762 F. App'x 7 (D.C. Cir. 2019). Space prevents a thorough analysis of the D.C. Circuit's opinion in *Guedes*, which declined to review the § 508 versus FVRA issue presented herein because of the Senate-confirmed Attorney General's ratification, which was done just days before that same panel was set to review the statutory issue on its merits. *Id*. at 11; Bump-Stock-Type Devices, 84 Fed. Reg. 9239 (the Attorney General ratifying Whitaker's rule and expressly citing concern for litigation over the statutory and constitutional issues). Clearly, the ratification was made by DOJ to procedurally block a merits consideration. But *critically*, the D.C. Circuit in *Guedes*, hurried by an accelerated briefing schedule for a preliminary injunction, only analyzed ratification based on the general and usual agency doctrine. *Guedes*, 920 F.3d at 12. The panel was not briefed on nor did they consider the history, analysis, or arguments presented herein that FVRA statutorily precludes ratification. *Id.* (stating the appellant did not challenge the ratification statutorily under FVRA, and in *dicta*, without any analysis or argument, classifying § 3348 as "only prohibiting the ratification of nondelegable duties"). In shorter terms, because of DOJ's last-minute ratification, the appellate panel and appellants were both hastily precluded from examining the statutory prohibition on ratification—which, as is shown here, was in fact applicable in that case.

300. S. REP. NO. 105-250, at 20.

301. *Id.* at 8; *see also* 144 CONG. REC. S11,021–22 (daily ed. Sept. 28, 1998), https://www.congress.gov/crec/1998/09/28/CREC-1998-09-28-pt1-PgS11021.pdf [https://perma.cc/9PYL-EUCM] (statement of Sen. Fred Thompson) ("[The *Doolin* court] allowed the later Senate-confirmed director to ratify the actions of the prior acting director . . . . This is not what the framers thought that they had established. It runs contrary to the Vacancies Act itself and corrective action therefore is necessary.").

302. *See supra* notes 297, 299–301.

303. Brief for Appellees at 70, 73, *Guedes*, 920 F.3d 1 (Nos. 19-5042, 19-5043, 19-5044, Consolidated), 2019 WL 1200603, at *70, *73.

construction would not even make the action and acting officer in *Doolin* subject to the enforcement mechanism—the very situation that § 3348 was enacted to enforce.

DOJ's error revolves around key text it misconstrues in its definition of "function or duty" at § 3348(a)(2) and (a)(2)(A):

> (2) the term "function or duty" means any function or duty of the applicable office that-
> (A)(i) is established by statute; and
> (ii) is required by statute to be performed by the applicable officer (and only that officer);

DOJ's construction of that definition grafts an extra requirement on to the provision that is not present in its text: that the duty must expressly be non-delegable.[304] Under DOJ's view, the duty must be expressly assigned to one officer by statute, and the statute must separately and expressly state that duty is not allowed to be delegated. Otherwise, DOJ argues, delegation or housekeeping statutes like 28 U.S.C. § 510, which allow duties to be delegated to any person, make a duty able to be performed by more than one person, and thus excludes such duties from the definition of what cannot be ratified.[305] But that is not what the text requires.

A plain-text reading—and one that wholly squares with the legislative intent and history—is that the "function or duty" must be expressly granted by the source of law to one officer and only one officer. Where Congress allowed a specific duty to be performed by one of two or more officers, where the duty is generally granted to an agency or organization, or where the duty is expressly said to be delegable in the same statute that authorized the duty, the definition does not apply.

A plain reading does *not* say that the source statute, or any second one, must prevent that *specifically assigned duty* from being further delegated under a *general* housekeeping statute. To read this proviso

304. Brief for Appellees, *supra* note 303.
305. *Id.*

as DOJ does makes it a practical nullity, if for no other reason than because *every single Executive department and many agencies have vesting and delegation statutes*, with almost no limit on what may be delegated.[306]

Thus, under DOJ's reading, only an exceedingly rare type of statute would qualify. Such a statute would have to expressly reject the broad authority of Executive branch agency heads to be responsible for all duties through vesting statutes, like § 509, or separately reject the delegation statutes that permit agency heads to delegate any function vested in them or their agency, like § 510. Initial searches found no duties or functions assigned by statute to DOJ PAS officers that would qualify under that kind of reading. And to date, DOJ has not identified any such statute that would qualify across all the Executive departments. It is quite likely that if such statutes are found, they will number so few and be so obscure as to inherently disprove DOJ's point. That could not have been what Congress had in mind, and it was not what was written in the text of the act.

Despite all the evidence and statements presented above that show § 3348 was written to overturn *Doolin*, DOJ misses a main point: under its construction, which grafts general delegation authority statutes onto any other specific statutory duty, *Doolin* would not have been overturned at all. The court in *Doolin* expressly noted that the acting officer at issue had statutory authority "to delegate 'any power.'"[307] But that parallel is ignored. As is the fact that there is no practical difference between the general delegation statute in *Doolin* and the general delegation statute for DOJ or any other Executive department head for that matter.[308]

306. *See supra* note 27 (listing the codified locations of every department's vesting and delegation statutes).

307. Doolin Sec. Sav. Bank v. Office of Thrift Supervision, 139 F.3d 203, 211 (D.C. Cir. 1998) (quoting 12 U.S.C. § 1462a(h)(4)(A)(ii) (1994)).

308. The acting official at issue in *Doolin* had a general delegation statute functionally indistinguishable from § 510. *Compare* 12 U.S.C. § 1462a(h)(4)(A)(ii) (1994) ("The Director may . . . delegate to any employee, representative, or agent any power of the Director), *with* 28 U.S.C. § 510 (2018) ("The Attorney General may . . . authoriz[e] the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."), *and* similar statutes cited *supra* note 27.

It simply does not align that FVRA's authors so railed against the result in *Doolin*, and repeatedly stated FVRA was enacted to overturn that court's take on ratification, only to have its lauded enforcement provision be ineffective in a similar circumstance. Throughout legislative history the enforcement provision was consistently described as "an effective enforcement mechanism" and "admittedly tough."[309] Even White House talking points warned of "administrative paralysis" as the "consequence of non-compliance" with FVRA because of that provision.[310] Thus, it would be exceedingly odd if Congress thought that its enforcement provision would be so effective, while intending it to cover almost no function in any Executive department because of housekeeping statutes.[311]

Other legislative history offers support for the plain-text reading advocated here. For one, DOJ's reading is quite similar to the reading the Minority Views called for in the Senate Report, but which was obviously not adopted, as those views remained in the minority: "It is imperative that the bill unequivocally ensure that the affected functions and duties of the office are only those that are expressly deemed nondelegable by statute or regulation."[312]

Plus, in defining what constituted a "function or duty" that could not be ratified, senators often aligned with this Article's construction: "any duties assigned just to that position by statute;"[313] "functions and

309. 144 CONG. REC. S12,824 (daily ed. Oct. 21, 1998), https://www.congress.gov/crec/1998/10/21/CREC-1998-10-21-pt1-PgS12810-6.pdf [https://perma.cc/QHZ6-TQXE] (statement of Sen. Robert Byrd) ("[T]his is an effective, and admittedly tough enforcement mechanism . . . .").

310. Vacancies Act—Talking Points [App. at A-113] (found in archives of Senator Byrd and stapled to a letter from the White House); Letter from Erskine Bowles to the Senate Majority Leader, The White House (July 28, 1998) [App. at A-88] ("[P]rocedures [are in] the bill that absolutely disable particular positions from taking binding legal actions . . . seriously disrupt[ing] the functioning of the Government."); *see also* 144 CONG. REC. S12,824 (using similar terms to respond to said White House talking points).

311. Congress was well aware of what vesting and delegation statutes did and knew that each Executive department had them. *See supra* section II.C; *see also* Memorandum from Morton Rosenberg, Cong. Research Serv., on Validity of Designation of Bill Lann Lee as Acting Assistant Attorney Gen. for Civil Rights, *supra* note 97 (Appendix 1 of that memorandum, listing the vesting and delegation statutes of each Executive department).

312. S. REP. NO. 105-250, at 36 (1998) (Minority Views of two senators) ("Absent that clarity, whole components of federal agencies would have to stop their work.").

313. 144 CONG. REC. S11,026 (daily ed. Sept. 28, 1998), https://www.congress.gov/crec/1998/09/28/CREC-1998-09-28-pt1-PgS11021.pdf [https://perma.cc/K7SZ-NC2X] (statement of Sen. Carl Levin).

duties that are specified to be performed by that official;"[314] or "duties that . . . are established by statute and are required to be performed only by the applicable officer."[315] Even the White House's talking points, distributed to Democratic senators, described the enforcement mechanism as covering "functions assigned to that office and no other."[316]

To be fair, there is some ambiguity in the Senate Report, which a few times characterizes the definition as covering "non-delegable" duties. But how DOJ interprets this characterization is not how the Senate Report explained it. First, "nondelegable duties" was used as a term of art in the GAC minority staff draft.[317] In that draft, § 3348 had a set definition for "nondelegable duties": "Any functions and duties exclusively assigned to the vacant office."[318] And because only the head of the agency could perform those duties, it is reasonable to presume that duties specified became nondelegable once vested in the agency head.[319] Next, consider page twenty of the Senate Report, where the General Counsel of the National Labor Relations Board is presented as having the "non-delegable" duty to "investigate and charge potential violations of the underlying regulatory statute."[320] Statutory text and legislative history show that this example referred to 29 U.S.C. § 153(d).[321] But nowhere in that statute does it expressly say that those duties of the General Counsel are non-delegable. In fact,

314. 144 CONG. REC. S6414 (daily ed. June 16, 1998), https://www.congress.gov/crec/1998/06/16/CREC-1998-06-16-pt1-PgS6405-3.pdf [https://perma.cc/FLS2-K2CU] (statement of Sen. Fred Thompson); *see also* Memorandum from Fred Ansell to Senator Fred Thompson, *supra* note 164 [App. at A-63] (explaining duties in § 3348 as "those that are specifically to be performed by the officer in the vacant office"); Transcript of June 17th GAC Meeting, *supra* note 86 [App. at A-66, A-74] (described by Senator Thompson as "specific functions of that officer").

315. S. REP. NO. 105-250, at 17.

316. *See* sources cited *supra* note 310.

317. *See* Memorandum from Fred Ansell to Senator Fred Thompson, *supra* note 145 [App. at A-48–A-49] (attaching the Democratic staff draft).

318. *Id.*

319. Indeed, 5 U.S.C. § 3348(b)(2) contains authority identical to the vesting aspect of housekeeping statutes and separately allows an agency head to perform duties but not redelegate them.

320. S. REP. NO. 105-250, at 20.

321. 29 U.S.C. § 153(d) (1998) ("He [the General Counsel] shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board."); S. REP. NO. 105-250, at 16 (no. 24 on the list of retained statutes citing that statute).

the D.C. Circuit expressly recognized that the same official can and has often "delegated his authority to investigate charges and issue complaint to thirty-two regional directors."[322] But to the authors of FVRA, that statute would still have met the definition of "function or duty." The same is true of the duties of several other officers, which clearly would have qualified because the offices had to be specifically excluded in § 3348(e).[323] Furthermore, if vesting and delegation statutes were already thought to generally apply, FVRA's § 3348(b)(2), which vests "functions and duties" in an agency head when an office must remain vacant, would itself be redundant and unnecessary.

In the end, DOJ's construction of the ratification provision in § 3348 aims to avoid judicial review of whether someone is serving in violation of FVRA or the specific succession statutes it grandfathered in § 3347. But if courts examine this statutory non-ratification provision within FVRA, they should find that this enforcement mechanism in FVRA is not toothless. Vesting and delegation statutes clearly do not exempt FVRA's enforcement mechanism from applying to practically any duty in the Executive branch. In this way, the merits of the office-specific statute debate can be resolved, and the sole conclusion called for by so many ordinary tools of statutory construction can be applied to give full effect to FVRA.[324]

322. SW Gen., Inc. v. NLRB., 796 F.3d 67, 71 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017).

323. For example, Chief Financial Officers (CFOs) were added to all departments and to the EPA and NASA as PAS officers by the Chief Financial Officers Act of 1990, Pub. L. No. 101-576, § 205, 104 Stat. 2838, 2842. No part of that law expressly said that their duties were non-delegable. Instead, that act imposed specific duties on each agency CFO specifically: "An agency [CFO] shall . . . ." 104 Stat. at 2843. The same is true of Inspectors General in (e)(3). The Inspector General Act of 1978, Pub. L. No. 95−452, 92 Stat. 1101, lists specific duties assigned to specific Inspectors General in each department but never says any of their duties may not be delegated.

324. DOJ would undoubtedly argue that courts already have reached the merits. But at the time this Article was submitted only one district court has ruled on this issue: *Guedes v. ATF*, 356 F. Supp. 3d 109 (D.D.C. 2019). Notably, that court did not consider or analyze most of the arguments presented here. Space also precludes addressing cases like *English v. Trump*, 279 F. Supp. 3d 307, 320, 322 (D.D.C. 2018), where an express-statement requirement was key in the court's decision, and where the court looked to § 508 as an example of a statute where "Congress intended to displace the FVRA." This author has written a more in-depth article specifically on the anti-ratification provision to more fully present the arguments briefly introduced here as well others that offer significant support: Migala, Vacancies Act III, *supra* note 95.

CONCLUSION

In sum, this Article concludes that although awkwardly written, FVRA did not offer an optional order of succession to the office of Attorney General. Rather, § 508 alone controls who may act as Attorney General because FVRA categorically grandfathered and exempted office-specific succession statutes, including § 508. As a result, Mr. Whitaker did not validly serve as Acting Attorney General. And FVRA's enforcement mechanism in § 3348 prevents certain actions of his from being ratified.